

BUSINESS MEETING

MEETING

BEFORE THE

COMMITTEE ON

ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JUNE 10, 2015

Printed for the use of the Committee on Environment and Public Works



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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS
FIRST SESSION

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BUSINESS MEETING

WEDNESDAY, JUNE 10, 2015

U.S. SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
Washington, DC.

The committee met, pursuant to notice, at 9:33 a.m. in room 406, Dirksen Senate Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Barrasso, Capito, Crapo, Boozman, Wicker, Fischer, Rounds, Sullivan, Boxer, Carper, Cardin, Whitehouse, Merkley, and Markey.

OPENING STATEMENT OF HON. JAMES INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Our meeting will come to order.

We do not have a lot of people here yet. We are going to go ahead and Senator Boxer and I will do our opening statements. Then we will wait for our quorum to show up.

I have made addressing EPA regulatory overreach one of my top priorities as Chairman of the Senate Environment and Public Works Committee. That is why I am particularly glad that today we are marking up the bipartisan S. 1140, the Federal Water Quality Protection Act after holding a bicameral oversight hearing in February, three field hearings in Alaska and Nebraska, and a legislative hearing.

Two weeks ago, EPA issued a final rule that expands Federal authority under the Clean Water Act by changing the definition of "waters of the United States." Absent legislation to stop it, this new rule will go into effect later this summer.

EPA took this action despite the fact that according, to the Corps of Engineers, 60 percent of the comments, during the comment period, opposed the rule, including 32 States, the U.S. Conference of Mayors, the National League of Cities and the National Association of Counties. We have all these people opposing this very stringent rule.

I have to add at this point that in my State of Oklahoma, which I do not think is much different from any other State, our Farm Bureau head, Tom Buchanan, says the problems the farmers and ranchers in Oklahoma face have nothing to do with anything you find in the farm bill. It is all overregulation by the EPA and the water regulations that scare them the most. That is their No. 1 priority right now.

Fortunately, this bipartisan legislation will stop the final rule and make EPA and the Corps of Engineers go back and redo it.

This time, they cannot avoid consultation with States and local governments. They will have to do a full economic analysis, including an unfunded mandates analysis, and they will have to review the impacts on small businesses and small local government.

These are process steps they skipped because they claim that a definition has no direct costs, a claim strongly disputed by States, local governments, and the Small Business Administration Office of Advocacy. We know that from the hearing we had here in these chambers. This legislation also prevents EPA from issuing a new rule that simply repeats their regulatory overreach.

Unlike the rule they issued 2 weeks ago, in a revised rule, EPA will not be able to claim the power to control land and water use based on use of water by birds or other animals, the seepage of water into the ground, water storage, and the overland flow of flood water. At the same time, the legislation encourages EPA to regulate streams that actually carry pollutants to navigable water and wetlands next to streams and rivers that filter pollutants.

Before some of you came in, I made the comment that in my State of Oklahoma, the president of the Oklahoma Farm Bureau, Tom Buchanan, says their No. 1 concern is this issue. I know that is probably true in Mississippi and other States too. We are going to try to correct that.

Senator Boxer.

[The prepared statement of Senator Inhofe follows:]

Inhofe Opening Statement for Business Meeting to Consider S. 1140, the Federal Water Quality Protection Act

As prepared for delivery:

I have made addressing EPA regulatory overreach one of my top priorities as Chairman of the Senate Environment and Public Works Committee.

That is why I am particularly glad that today we are marking up the bipartisan S. 1140, the Federal Water Quality Protection Act after holding a bicameral oversight hearing in February, three field hearings in Alaska and Nebraska, and a legislative hearing.

Two weeks ago, EPA issued a final rule that expands federal authority under the Clean Water Act by changing the definition of "waters of the United States." Absent legislation to stop it, this new rule will go into effect later this summer.

EPA took this action despite the fact that according, to the Corps of Engineers, 60% of the comments opposed the rule, including 32 states, the U.S. Conference of Mayors, the National League of Cities and the National Association of Counties.

Fortunately, this bipartisan legislation will stop the final rule and make EPA and the Corps of Engineers go back and redo it.

And, this time -

- they cannot avoid consultation with states and local governments,
- they will have to do a full economic analysis, including an unfunded mandates analysis, and
- they will have to review the impacts on small businesses and small local government

These are process steps they skipped because they claim that a definition has no direct costs – a claim strongly disputed by states, local governments, and the Small Business Administration Office of Advocacy. This legislation also prevents EPA from issuing a new rule that simply repeats their regulatory overreach.

Unlike the rule they issued two weeks ago, in a revised rule EPA will not be able to claim the power to control land and water use based on -

- use of water by birds or other animals,
- the seepage of water into the ground,
- water storage, and
- the overland flow of flood water.

At the same time, the legislation encourages EPA to regulate streams that actually carry pollutants to navigable water and wetlands next to streams and rivers that filter pollutants. It does not put downstream water at risk. It does not put drinking water at risk, and it does not remove protections from our streams.

It sets up the right process and the right principles to make sure that the agencies can protect water quality without taking control over huge swaths of private property.

I urge all members to support reporting this bipartisan legislation to the full Senate.

**OPENING STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you so much, Mr. Chairman.

You heard my chairman say that his priority is going after EPA overreach. His priority is going after the Environmental Protection Agency. It is his right, as he and I have said often. Elections have consequences. When I had the gavel, we did a lot of different things here. He has the gavel and it is his right.

I want to remind colleagues that this is the Environment Committee and not the anti-environment committee. I hope we will remember that our charge is to protect the people of America from harmful pollution.

Today, we are considering legislation that would undermine one of our Nation's landmark laws, the Clean Water Act, and roll back protections for the American people, their drinking water. It will actually roll back protections for 117 million people.

We talk a lot about national security, as we should. Nothing is more important than protecting the lives of the American people. Members of this Committee should understand that when we weaken the Clean Water Act, as this bill will do, we are putting the lives of our people in danger.

The Clean Water Act prevents the uncontrolled pollution of the streams, rivers, and lakes where our children swim and that provide drinking water to millions of Americans. If the Clean Water Act does not apply, polluters can dump raw sewage that would sicken children swimming in contaminated waters.

Factories can discharge industrial waste containing heavy metals, such as arsenic, lead, and selenium. Drilling companies can discharge wastewater containing known carcinogens like benzene and chromium-6. We need a strong Clean Water Act to ensure this does not happen.

Decades ago, the United States experienced widespread damage and degradation to our environment. The Cuyahoga River in Cleveland, Ohio was on fire and our lakes were dying from pollution. In 1972, Congress passed the Clean Water Act.

Unfortunately, the legislation before us today would take us in the wrong direction by removing protections and creating more confusion and uncertainty about which waters are protected. That is why over 80 scientists with expertise in the importance of streams and wetlands, as well as the Society for Freshwater Science, have written to us opposing this bill.

We have also received opposition letters from numerous sportsmen groups, including the American Fly Fishing Trade Association, Backcountry Hunters and Anglers, Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, Trout Unlimited and many other groups.

I ask unanimous consent to place all of them into the record.

Senator INHOFE. Without objection.

[The referenced information follows:]



Society for Freshwater Science

www.freshwater-science.org

May 19, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: SFS Strongly Opposes S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The Society of Freshwater Science strongly opposes S.1140, confusingly titled the "Federal Water Quality Protection Act." It is our professional opinion that S.1140 would derail a near-final EPA rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to clarify longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

SFS is a scientific society with more than 1600 members from around the world whose research and professional activities focus on the physical, chemical, and biological structure and function of rivers and streams and other shallow-water ecosystems. SFS promotes and advocates the use of the best available science for decision-making related to freshwater ecosystems and communicates this science as necessary to inform the public, environmental managers, and decision makers.

More than a century of scientific research, much of it produced by members of our Society, has clearly shown that headwater, ephemeral, intermittent, and small perennial streams, as well as lakes, wetlands, and groundwater habitats associated with these waters, are an integral part of the physical, chemical, biological, and ecological quality of entire river networks and their downstream receiving waters. Although some small streams and wetlands may not have a surface connection to larger water systems throughout the year, hydrologic connectivity does exist and these systems in aggregate directly influence and regulate the chemical, physical, and biological integrity of all of the Nation's waters. The Clean Water Act (CWA), as it is presently being interpreted, cannot adequately provide the means to restore and maintain the chemical, physical, and biological integrity of all of the Nation's waters unless it includes headwaters and adjacent waters as "waters of the U.S." Specifically, our research shows that headwaters:

- affect chemical integrity by their capacity to uptake, retain, transform and transport nutrients and contaminants;

President: Dr. David L. Strayer Cary Institute of Ecosystem Studies, Box AB, Millbrook, NY 12545 USA: Phone (845) 677-5343; Fax (845) 677-5976.

President-Elect: Dr. Matt R. Whiles, Department of Zoology and Center for Ecology, Southern Illinois University, Carbondale, IL 62901 USA: Phone (618) 453-7639; Fax (618) 453-2806

Treasurer: Dr. Michael C. Swift, Biology Department, St. Olaf College, 1520 St. Olaf Ave., Northfield, MN 55057 USA: Phone (507) 786-3886; Fax (507) 786-3968.

- affect the physical integrity of waterways by controlling rates of runoff, water flow, and sediment delivery;
- affect the biological integrity of waterways by providing food resources, thermal refuges, spawning sites, nursery areas, and essential habitat for unique plants and animals, including numerous threatened and endangered species;
- are often profoundly altered by human activities, to the detriment of downstream water bodies and the public interest; and
- are likely to be among the first freshwater ecosystems to be affected by climate change.

Based on this science, it would be impossible to adequately restore and maintain the chemical, physical, and biological integrity of the Nation's waters without explicitly including headwater and adjacent waters as part of "waters of the U.S." Further, we note that since inception of the CWA there have been significant improvements to water quality and the health of aquatic ecosystems of the Nation, in part due to the historically broad scope of protection.

With these observations in mind, **SFS supported the proposed EPA rulemaking effort to more clearly define the jurisdictional Waters of the United States in this rule** (see our comment [here](#)) and we provided comments that substantively improved the final rule. We especially complimented the United States Environmental Protection Agency for the thorough and rigorous process used in developing the science to support their rulemaking. This scientific work included one of the most comprehensive reviews to date, a detailed and extensive report providing the content and implications of that comprehensive review¹, commitment to a rigorous independent review process, and an additional review by the EPA Science Advisory Board. We praise the Agency for the scope, extent, and quality of its science.

In contrast, S. 1140 does not reflect current scientific knowledge nor has it been exposed to rigorous independent peer review.

Specifically, S. 1140 rejects the key scientific principles and findings of the EPA rulemaking, undermining the ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays. It is our professional opinion, that as a result of S. 1140:

- **Many streams would be harder to protect.** The bill would include streams identified in a USGS data set that, among other limitations, doesn't generally pick up streams that are less than a mile long. The bill neglects inclusion of additional streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway. This ignores the volumes of research produced by freshwater scientists clearly demonstrating the connectivity and importance of small intermittent streams to water quality.
- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways. Research by freshwater scientists clearly defines the importance of adjacent wetlands to water quality and the importance of the entire watershed context.
- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of

¹ U.S. Environmental Protection Agency (USEPA). 2013. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. US Environmental Protection Agency, Washington, D.C. EPA/600/R-11/098B.

wetlands that are “next to” other protected waterways. The effect of these exemptions would be to allow waste into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution. Again, work by freshwater scientists has shown that the connection of isolated wetlands through intermittent surface and groundwater flowpaths is integral to the quality of downstream waters.

In addition, SFS has the following concerns about the bill:

- **S. 1140 appears to exclude certain long-protected water bodies by narrowly defining “body of water” to ignore many man-made tributaries, even where they essentially function as natural streams, and even though such waters have significant impacts on downstream waters.**
- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any “organism,” despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds. This rule seems to directly contradict the very preamble of the Clean Water Act to protect and restore physical, chemical, and biological integrity [emphasis added].**
- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding**
- **The bill rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

And, most importantly, as members of the scientific community and advocates for the use of sound science in decision-making, a requirement of government agencies set by the US legislative and executive branches, we are most concerned about the following:

- **The conclusions in S. 1140 are contrary to the weight of scientific evidence. They are not based on sound science.**
- **The recommendations and assertions in the bill have not been exposed to scientific peer review.**

We are on the verge of securing a scientifically sound Clean Water Rule that will bolster the effectiveness of the Clean Water Act in maintaining and restoring our nation’s waters. We urge Congress to support the agencies’ final Clean Water Rule, respecting decades of robust scientific literature that demonstrate the critical role of aquatic systems and clarifying and restoring longstanding protections for these vital waters by clarifying their coverage under the Clean Water Act

Respectfully,



David Strayer, Ph.D.
President, Society for Freshwater Science

cc: Administrator McCarthy, Environmental Protection Agency
Asst. Secretary Darcy, United States Army Corp of Engineers
Secretary Vilsack, United States Department of Agriculture
Secretary Jewell, United States Department of Interior
Chair Goldfuss, Council on Environmental Quality

AMERICAN FISHERIES SOCIETY · AMERICAN FLY FISHING TRADE ASSOCIATION ·
BACKCOUNTRY HUNTERS AND ANGLERS · BERKLEY CONSERVATION INSTITUTE ·
BULL MOOSE SPORTSMEN'S ALLIANCE · DALLAS SAFARI CLUB · IZAAK WALTON
LEAGUE OF AMERICA · NATIONAL WILDLIFE FEDERATION · THEODORE ROOSEVELT
CONSERVATION PARTNERSHIP · TROUT UNLIMITED

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: Hunters and Anglers Strongly Oppose S.1140, Legislation Blocking the Clean Water Rule

Chairman Sullivan and Ranking Member Whitehouse:

The undersigned sportsmen organizations strongly oppose S.1140, the "Federal Water Quality Protection Act." S.1140 would derail a near-final rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat that supports a robust outdoor recreation economy.

The Environmental Protection Agency and the Army Corps of Engineers (the agencies) are very close to completing the clean water rule, which takes a huge step forward in clarifying protections for many streams and wetlands that have been at increased risk of pollution or destruction over the last decade. These at-risk streams and wetlands are home to countless fish and wildlife species, and America's hunters and anglers rely on them for access to quality days in the field. In addition, the clean water rule is informed by a thorough and extensive review of the peer-reviewed literature of wetlands and hydrologic sciences demonstrating the important chemical, physical, and biological connections between water bodies.

We have three primary objections to S.1140. First, S.1140 will lock in the current state of jurisdictional confusion, meaning that valuable fish and waterfowl habitat will remain at risk indefinitely. The bill prohibits the agencies from clarifying the Clean Water Act until they have met several specified criteria, which, despite a December 31, 2016, target date the agencies "should use best efforts" to meet, they may not be able to do for the foreseeable future. After nearly 15 years of Clean Water Act confusion, such an extended delay is unacceptable to the millions of hunters and anglers eager to have their local waters fully protected again.

Second, S.1140's consultation requirements are unnecessary and duplicative. The agencies engaged in a very transparent and thorough multi-year rulemaking process that included over 400 stakeholder meetings and an extended public comment period that produced over one million comments. The bill requires the agencies to halt the current rulemaking just weeks before it is complete, solicit input from stakeholders they have already consulted, consider factors they have already considered, and then propose the rule anew. In reality, the legal issues surrounding Clean Water Act jurisdiction have been hashed out, the science has been analyzed, peer-reviewed, and compiled, and the public and key stakeholders have weighed in. Simply put, the agencies have all the information they need to make an informed decision. There is nothing to gain by further delaying this rule.

Third, S.1140 would eliminate federal protections for waters long covered by the Clean Water Act. The bill makes it more difficult to protect smaller headwater streams, disregards wildlife connections in jurisdictional determinations, and eliminates protections for "isolated" waters. Many of these types of waters are prime hunting and fishing grounds, and in the case of what the bill calls "isolated" waters, are also the primary breeding grounds for the vast majority of waterfowl in North America.

We commend the agencies for advancing this long overdue rulemaking. This rule represents the best chance in a generation to clarify Clean Water Act protections while preserving – and, in some cases, enhancing – longstanding Clean Water Act exemptions for farmers, ranchers and foresters that encourage wise stewardship of land and water resources.

After an exhaustive rulemaking process, we are just weeks away from a final rule that will contain changes responding to the constructive criticisms offered during the comment period, resulting in a clearer, stronger final product. All stakeholders, including the nearly 900,000 members of the public who commented in support of clarified protections, should be given the opportunity to review the final rule. Rather than pursue legislation that will derail the rulemaking and lock in Clean Water Act confusion indefinitely, we urge you instead to reserve judgment and review the final rule when it is completed in the coming weeks.

The Clean Water Act has always been about restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. It is bedrock support for America's more than 40 million hunters and anglers, and for the 117 million Americans whose drinking water depends on healthy headwater streams. Protect America's clean waters. Oppose S.1140 and allow the open, transparent, and thorough rulemaking process to conclude at long last.

Thank you for considering our views.

Sincerely,

American Fisheries Society
American Fly Fishing Trade Association
Backcountry Hunters and Anglers
Berkley Conservation Institute
Bull Moose Sportsmen's Alliance

Dallas Safari Club
Izaak Walton League of America
National Wildlife Federation
Theodore Roosevelt Conservation Partnership
Trout Unlimited

*Revised and submitted for the record 5.28.15
with additional scientist signatures*

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The undersigned scientists strongly oppose S.1140, misleadingly titled the "Federal Water Quality Protection Act." S.1140 would derail a near-final rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

Of central concern to us as scientists is that the bill disregards the rigorous science on which the Clean Water Rule is based, hamstringing the agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to water quality.

As scientists who have spent careers studying streams and wetlands, we are aware of the need to restore protections for these aquatic ecosystems under the Clean Water Act. For years now we have urged the Administration to address this issue through a rulemaking to clarify which waters are protected. To inform this critically important rulemaking, we have joined many of our colleagues in contributing to the Environmental Protection Agency's ambitious connectivity science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2014). We have contributed to the underlying peer-reviewed scientific studies, informal reviews of the draft Connectivity Report, and the formal Science Advisory Board peer review of the Connectivity Report. The undersigned are professional scientists with broad knowledge and expertise in stream and wetland ecosystems, including their physical structure, chemistry, and biology. The scientists who have signed this letter include leading researchers on the ecology, water quality, and biota of rivers, streams, and wetlands.

Now, just as the agencies are on the verge of finalizing this important science-based rulemaking, S. 1140 would not only derail this rulemaking, but seeks to prohibit any future rulemaking that does not meet its "principles;" "principles" that disregard the connectivity science – as well as the goals, framework, and legislative intent of the 1972 Clean Water Act. S. 1140 hamstring the

agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to "maintaining and restoring the physical, chemical, and biological integrity of the nation's waters."

Wetland and stream science has consistently demonstrated the importance of small streams and wetlands for flood control, groundwater recharge, reducing concentrations of pollutants in drinking water sources, reducing erosion, and providing essential habitat for plant and animal species, all of which provide significant public benefit.

Below, borrowing from our 2011 letter to the Council on Environmental Quality, and updated with quotes from the Science Advisory Board 2014 letter to the Environmental Protection Agency regarding the scientific basis of the proposed rule, we briefly outline basic principles and findings of connectivity science that are rejected by S. 1140, but must be reflected in the Clean Water Rule in order to meet the goals of the Clean Water Act:

1. Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. The small intermittent stream is not isolated from the mighty river. Longstanding and robust scientific research has demonstrated the longitudinal connectivity of river networks, i.e., **that ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.**
2. **A sizable fraction of channel length in a river network is in intermittent and headwater streams.** In arid states such as Arizona, Utah, and Colorado, from 71 to 96% of stream miles have been classified as ephemeral or intermittent. Intermittent streams are also significant in states that receive more rainfall. In Alabama, 80% of stream miles in the National Forests are considered intermittent because they go dry during late summer or autumn; intermittent streams in Michigan comprise 48% of the length of stream channels in the state. These examples illustrate the extent of intermittent streams in river networks throughout the Nation.
3. As the SAB concluded from the 2014 *Connectivity Report*:

There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.
4. From a wetland perspective, the EPA and Army Corps of Engineers estimate that over 20 million acres of wetlands in the contiguous 48 states could be considered "geographically isolated." Despite often not having a connection to navigable waters that is direct or that exists throughout the year, **the scientific literature demonstrates that these wetlands**

are nevertheless often interconnected with navigable waters and are often not ecologically and/or hydrologically isolated.

5. As the SAB concluded from the 2014 *Connectivity Report*:

The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because **adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters. Importantly, the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity.** Thus, the Board advises the EPA that adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.

6. The SAB also concluded:

The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.

7. The SAB further concluded:

There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas 18 coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States.

8. And furthermore:

... [A]s the science continues to develop, other sets of wetlands may be identified as "similarly situated." The Board notes, however, that **the science does not support excluding groups of "other waters" (or subcategories of them, e.g., Great Plains playa lakes) that may influence the physical, chemical and biological integrity of downstream waters.**

9. The SAB also advised EPA:

The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.

10. And that:

...[T]here is a lack of scientific knowledge to help discriminate between ditches that should be excluded or included. For example, many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the Cowardin classification system and may provide certain ecosystem services.”

11. **Small streams and wetlands contribute to the physical integrity of navigable rivers.**

They provide hydrologic retention capacity (i.e., the ability to hold and store water), and when they have been eliminated as a result of human activity, the frequency and intensity of flooding increases downstream, and base flows are lower. For example, studies have shown that the loss of two-thirds, or about 14 million acres, of prairie pothole wetlands (considered within the “geographically isolated wetland” designation) has contributed significantly to increases in the flooding and associated damages of the Red River and other navigable rivers of the region. Small streams and wetlands also improve water quality by storing eroded sediment, thereby reducing downstream sediment transport during storms, and are critically important in recharging groundwater and other sources of water for drinking, irrigation and industry.

12. **Small streams and wetlands also contribute to the chemical integrity of navigable rivers.**

These are the channels of the drainage network in closest contact with the soil and are the sites of extensive chemical and biological activity that influences water quality downstream. Small streams and wetlands are the sites of active uptake, transformation, and retention of nutrients; their degradation results in increased downstream transport of nutrients, which can result in eutrophication (e.g., nuisance algal blooms) of downstream rivers, lakes, and estuaries. Nutrients and contaminants enter streams from non-point sources primarily during storms, and it is during storms when small streams and wetlands are most likely to contain water and provide nutrient removal services. Likewise, Delmarva bay wetlands provide similar water quality protection and improvement functions for water that flows through them in transit to the Chesapeake Bay. Likewise, playa lake wetlands of the southern Great Plains, a class of “geographically isolated wetland,” collect and improve the quality of water that ultimately filters through them and recharges the Ogallala aquifer, which provides drinking and irrigation water for eight states.

13. **Small streams and wetlands contribute to the biological integrity of navigable rivers.**

They supply food resources to riparian and downstream ecosystems. For example,

invertebrate inhabitants of headwater streams are sources of food to fish, and emerging aerial adults of aquatic insects provide food for birds and bats. Small streams provide a thermal refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including many prized sport fishes. Small streams and wetlands also provide critical habitat for unique and threatened species of invertebrates, amphibians and fishes. For example, prairie potholes provide the breeding habitat that produces an estimated 50-70% of the total annual duck production in North America. Approximately one-half of the continent's bird species are wetland-dependent or associated, and most of these are migratory birds shared across international borders and by all states in each of the four flyways covering the U.S.

Small streams and wetlands are an integral part of the nation's network of waters, and provide numerous ecological goods and services of significant value to society. Although they may not have a permanent or direct hydrologic connection to a navigable river, they have a demonstrable functional connection with and a direct impact on the physical, chemical, and biotic integrity of navigable rivers.

On the basis of decades of scientific research, it is clear that small streams and wetlands are not isolated or unrelated to the ecological integrity of navigable waterways. If our nation hopes to achieve the goals of the Clean Water Act, small streams and wetlands must remain within its jurisdiction.

S. 1140 rejects these key scientific principles and findings, undermining our ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays.

- **Many streams would be harder to protect.** The bill would include streams identified in a USGS data set that, among other limitations, doesn't generally pick up streams that are less than a mile long. The bill erects an enormous hurdle to including additional streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway.
- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways.
- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of wetlands that are "next to" other protected waterways. The effect of these exemptions would be to allow dumping of wastes into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution.
- **The bill appears to exclude certain long-protected water bodies by narrowly defining "body of water" to ignore many man-made tributaries, even where they**

essentially function as natural streams, and even though such waters have significant impacts on downstream waters.

- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any “organism,” despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds.**
- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding.**
- **The bill also rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

We are on the verge of securing a scientifically sound Clean Water Rule that will bolster the effectiveness of the Clean Water Act in maintaining and restoring our nation’s waters. We urge Congress to support the agencies’ final Clean Water Rule, respecting decades of robust scientific literature that demonstrate the critical role of aquatic systems and clarifying and restoring longstanding protections for these vital waters by clarifying their coverage under the Clean Water Act.

Respectfully Submitted,

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cc: Administrator McCarthy, Environmental Protection Agency
Asst. Secretary Darcy, United States Army Corp of Engineers
Secretary Vilsack, United States Department of Agriculture
Secretary Jewell, United States Department of Interior
Chair Christy Goldfuss, Council on Environmental Quality

Senator BOXER. These groups understand the important link between clean water and outdoor recreation. These groups work with Republicans and Democrats alike and they fiercely oppose this bill.

Over 40 leading law professors that study, teach, and write about the Clean Water Act have concluded "S. 1140 would constitute a massive weakening of the Clean Water Act."

I ask unanimous consent to enter these and other letters of opposition into the record.

Senator INHOFE. Without objection.

[The referenced information follows:]

May 18, 2015

United States Senate

Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Subject: Proposed S.1140, the “Federal Water Quality Protection Act”; pending rulemaking regarding “waters of the United States”

Dear Senators,

We the undersigned are professors of law who teach and write about environmental law. In particular, we have studied, taught, and also written or lectured about changes in the law regarding what are protected “waters of the United States.”

We write to offer our critique of S.1140, entitled the “Federal Water Quality Protection Act,” sponsored by Senator Barrasso and 27 other senators. This bill proposes to derail over a year of work on a regulation proposed on April 21, 2014 by the Army Corps of Engineers and the Environmental Protection Agency regarding the scope of protected “waters of the United States.” That proposed regulation linked directly to an accompanying massive study of all peer reviewed science of functions of various sorts of waters and their “connectivity.” (Hereinafter, we will refer to this as the “Connectivity Report.”) Public comments were also sought and received regarding the Connectivity Report. The notice and comment phases for this “waters” rulemaking are over, involving over a million comments filed and hundreds of meetings about the proposed rule. Its issuance as a final rule is anticipated to occur this spring.

We believe that S.1140 is ill-advised procedurally, is problematic in its drafting choices and failure to mesh with peer reviewed science, would engender decades of litigation and regulatory uncertainty, and substantively would result in a major weakening of the current Clean Water Act. We instead ask Congress to let the current rulemaking finish with issuance of a final regulation. That final regulation may address concerns and objections, but if not then either Congress can act with reference to an actual final rule, those affected can pursue relief with the Corps and EPA, or those aggrieved can file a challenge in federal court.

I. Derailing the “waters of the United States” rulemaking would be wasteful and deny all the benefit of the rulemaking process

When the Environmental Protection Agency (EPA) and the Army Corps of Engineers started the rulemaking process for the pending “waters” rule last year, they were responding to calls for clarifying regulations from environmentalists, the private sector, and a majority of the Supreme Court. Protecting jurisdictional waters was an

area of bipartisan consensus for thirty years, right through the recent Bush Administration. A unanimous Court deferred to agency line-drawing in regulations about what sorts of waters deserved protection in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). However, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and then *United States v. Rapanos*, 547 U.S. 715 (2006) (*Rapanos*) unsettled that longstanding bipartisan consensus, breeding new legal uncertainty. *Rapanos* itself resulted in two different Court numerical majorities about what sorts of waters are federally protected. In addition, the opinion of Justice Anthony Kennedy articulated a “significant nexus” test for future jurisdictional determinations that, in the absence of clarifying rulemakings, also resulted in somewhat unpredictable jurisdictional calls. Under Supreme Court doctrine, the Kennedy opinion has been viewed as most authoritative in the absence of a single Court majority opinion; in addition, four justices agreed with protecting the sorts of waters protected by Justice Kennedy, creating a five justice majority. Since *Rapanos*, the EPA and Corps have acted under interpretive guidance documents and courts have clashed on what sorts of waters are protected. Clarifying legislation never emerged from congressional committees. And now bills in the House and the Senate in somewhat varying ways seek to preclude EPA and the Army Corps from finalizing their waters rulemaking.

S.1140 mandates extensive re-doing of the rulemaking process for a new “waters” rule, plus adds on top as a statutory requirement compliance with an array of executive orders. In addition, the bill contemplates 330 days of rulemaking process, including submission of a pre-proposal document that would summarize and provide responses arising out of the pending notice and comment process, but without allowing completion of that rulemaking unless it complies with S.1140’s new procedural and substantive hurdles. Any new rule would also be required to go through a pre-proposal submission to House and Senate committees. This bill hence would impose for a future “waters” regulation an unusually lengthy and labyrinthine set of procedural requirements.

The waters rule has already gone through an extensive participatory process. Vast private and governmental resources have been expended on this proposed rule. The Senate’s choices are simple. It can let the rulemaking finish, or it can seek to preclude its completion, or, as proposed in this new bill, it can both derail the pending rulemaking and make massive changes to the scope of the Clean Water Act. We ask the Senate to allow completion of the waters rule, then allow all affected interests to study the final actual choices. The Clean Water Act should not be weakened.

II. *The proposed bill ignores science regarding waters and their functions*

This proposed bill uses terms like “isolated” that have appeared in some court opinions interpreting the Clean Water Act, as well as terms like “natural” channel. These terms, however, do not describe recognizable scientific categories of waters

and fail to consider how many rivers and streams are channelized, especially as they move through urbanized environments or near infrastructure projects. Similarly, it refers in a few places to “statistically valid” methodology and streams, but then does not link that language to the vast array of waters and regions studied in the Connectivity Report. It also references a particular mapping approach that could undermine protection for waters due merely to their length, plus could be read to make almost all wetlands’ protections subject to case-by-case analysis.

In fact, this bill nowhere even references the Connectivity Report. The Connectivity Report is a remarkable document, responding to decades of calls for regulation to be based on peer reviewed science. If there is to be a Senate bill or other new legislation, it should not ignore relevant peer reviewed science.

III. The pending bill is laden with problematic drafting choices that would engender uncertainty

This brief letter cannot fully critique this proposed 27 page bill, but here points out a handful of important but problematic drafting choices. Most significantly, much of this bill is written as though it is a policy critique and statement of policy preferences, yet if passed it would constitute the first substantive change to the scope of the Clean Water Act in years. Among its other drafting problems are the following:

--it repeatedly references Code of Federal Regulation sections, yet such regulations have spawned many related guidance documents, regulatory approaches, and judicial precedents. Is this bill meant to incorporate all of them? The proposed waters rule is meant to reduce current regulatory uncertainty; are references to current CFR provisions meant to freeze in place regulatory approaches, including those in a state of conflict?

--the Clean Water Act, like other federal environmental laws, has long called for federal leadership but also “saved” and encouraged state action either to help with implementation of federal law or in offering greater or additional protections. Abundant regulatory and case law has fleshed out what existing statutory language means. The new Senate bill, however, uses language that mainly adds emphasis regarding the importance of state roles. It even inverts the usual roles, referring to the “limits of federal jurisdiction” and the “primary” role of states. This language lacks any clear substance, but in raising questions about the clear supremacy of federal law would undoubtedly engender years of disagreement and litigation.

--the proposed bill defines critically important terms but with repeated use of the same term being defined (for example, “continuous” in Section 3(11)(C)).

--some of the drafting uses layers of interrelated language of prohibition, leaving ambiguity. (See, especially, the Section 4(b)(3) provisions about what “waters”

“should not include” and subpart 4(b)(3)(D) and its subparts about “a system” . . . “holding” various sorts of waters and then “not including instream reservoirs or other instream facilities.”)

--Section 4(c) converts an array of executive orders into a statutory mandate, but then repeatedly mentions only “costs,” whereas modern approaches to cost-benefit analysis usually call for assessment of costs and benefits, with a preference or mandate for maximizing net benefits and clarity about statutory requirements trumping executive orders. Section 4(c) should be deleted or amended to create clarity.

IV. S.1140 would result in a major weakening of the Clean Water Act

Most importantly, S.1140 would constitute a massive weakening of the Clean Water Act. Even with current legal uncertainty post-*Rapanos*, the “significant nexus” test articulated by Justice Kennedy calls for analysis of the many functions of waters, both on their own and in combination with other similar waters. The focus is on waters’ functions, regardless of how man may have modified some of those water and land features. S.1140’s Section 4(b)(3) exclusions basically would legislatively jettison that approach, with huge carve-outs that could be argued to exclude vast swaths of currently protected waters.

For example, the bill states the Clean Water Act would not protect any “system” “used for . . . collecting, conveying, [or] holding” “stormwater or floodwater,” “including ditches” along a variety of types of infrastructure. First, “system” is not limited to structures created by man; what about the many types of waters that are of huge value due to how they absorb stormwater or floodwater? What counts as a “ditch” under this bill? And although some ditches indeed might not deserve protection, in urbanized areas many so-called “ditches” are of huge importance. S.1140 might be read to exclude them, regardless of their importance. But by not defining what is meant by “ditches,” an issue of huge importance is left uncertain.

Similarly, is it even possible that this bill means to exclude from protection “municipal water supplies,” as one could read Section 4(b)(3)(D)? Are waters meant to be excluded merely because they are used for “agricultural or silvicultural purposes”? Since most rivers are used at many points for such purposes, what happens to their protection? The CFR references seem to indicate an intent to offer some regulatory continuity, but then these carve-outs might be argued to cause a major weakening of the law.

Conclusion

In light of its many problematic provisions, we call for rejection of S.1140. The Clean Water Act has been among America’s great success stories. We ask this committee and Congress to allow completion of the “waters of the United States” rulemaking. Once a final rule is issued, both supporters and critics can study it with care and respond. The longstanding

bipartisan consensus on protection of America's waters rested on firm foundations and sound science. Worries about a rulemaking that has not even been finished should not provoke a major weakening of the Clean Water Act.

Sincerely,

[Note: University affiliation are presented for identification purposes only. Signatories to this letter join in their individual capacity.]

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Senator BOXER. The final Clean Water Rule that S. 1140 will block clearly protects streams that provide drinking water to millions of Americans while establishing exemptions for numerous water bodies that do not impact downstream water quality.

For the first time, Federal regulations will explicitly exclude numerous types of ditches. You are going to hear all kinds of misinformation on this. This rule excludes numerous types of ditches, stormwater collection and treatment systems, artificial ponds, water-filled depressions, puddles, and recycling water facilities.

If the Barrasso bill, S. 1140, passes, all of these new exemptions will be blocked. This bill would create more confusion for businesses and landowners by taking away new exemptions and sending EPA and the Corps back to square one.

After years of uncertainty following two Supreme Court decisions, we should not pass legislation that would create more confusion and invite years of new litigation. The Obama administration's efforts are about protecting drinking water for American families and businesses, and the process, alluded to by my chairman, has been open and inclusive. More than 1 million comments were received during a comment period that lasted over 200 days, and over 400 outreach meetings with stakeholders and State and local governments were conducted.

Instead of advancing a bill that would allow more pollution of our waterways, we should listen to the wide variety of stakeholders that support the proposed clean water rule. A poll released last month shows that 78 percent of the people think Congress should allow the rule to move forward but not in this committee. Who are they listening to? I will leave that to you to figure out.

It is time to restore much-needed certainty, consistency, and effectiveness and S. 1140 does just the opposite. It would result in further delay, more uncertainty, and less protection for the American people.

[The prepared statement of Senator Boxer follows:]

Statement of Senator Barbara Boxer EPW Full Committee Business Meeting on S. 1140 June 10, 2015

(Remarks as prepared for delivery)

Today, the Committee will consider legislation that would undermine one of our nation's landmark laws – the Clean Water Act – and roll back protections for small streams and wetlands that provide drinking water to roughly 1 in 3 Americans or 117 million people.

We talk a lot about national security, as we should. Nothing is more important than protecting the lives of the American people. Members of this Committee should understand that when we weaken the Clean Water Act, we are putting people in danger.

The Clean Water Act prevents the uncontrolled pollution of the streams, rivers, and lakes where our children swim and that provide drinking water to millions of Americans. If the Clean Water Act does not apply, polluters can dump raw sewage that would sicken children swimming in contaminated waters. Factories can discharge industrial waste containing heavy metals, such as arsenic, lead, and selenium. Drilling companies can discharge wastewater containing known carcinogens like benzene and chromium-6. We need a strong Clean Water Act to ensure this does not happen.

Decades ago, the United States experienced widespread damage and degradation to our environment – the Cuyahoga River in Cleveland, Ohio, was on fire and our lakes were dying from pollution. The American people demanded action, and in 1972 Congress passed the Clean Water Act by an overwhelming bipartisan majority.

Unfortunately, the legislation before us today would take us in the wrong direction by removing protections and creating more confusion and uncertainty about which waters are protected. It would ignore the overwhelming science showing the importance of small streams and wetlands. That is why over 80 scientists with expertise in the importance of streams and wetlands, as well as the Society for Freshwater Science, have written to us opposing this bill.

We have also received opposition letters from numerous Sportsmen groups, including the American Fly Fishing Trade Association, Backcountry Hunters and Anglers, Izaak Walton League of America, Theodore Roosevelt Conservation Partnership, and Trout Unlimited. These groups understand the important link between clean water and the outdoor recreation economy.

Over 40 leading law professors that study, teach, and write about the Clean Water Act have concluded that "S. 1140 would constitute a massive weakening of the Clean Water Act."

I ask unanimous consent to enter these and other letters of opposition into the record.

The final Clean Water Rule that S. 1140 will block clearly protects streams that provide drinking water to millions of Americans while establishing exemptions for numerous water bodies that do not impact downstream water quality. For the first time, Federal regulations will explicitly exclude numerous types of ditches, stormwater collection and treatment systems, artificial ponds, water-filled depressions, puddles, and recycling water facilities. If the Barrasso bill, S. 1140, passes, all of these new exemptions will be blocked.

The Barrasso bill would create more confusion for businesses and landowners by taking away new exemptions and sending EPA and the Corps back to square one to try to figure out the confusing new terms and standards in the bill. After years of uncertainty following two Supreme Court decisions, we should not pass legislation that would create more confusion and invite years of new litigation.

The Obama Administration's efforts are about protecting drinking water for American families and businesses, and the process it has undertaken has been open and inclusive. More than 1 million comments were received during a comment period that lasted over 200 days, and over 400 outreach meetings with stakeholders and state and local governments were conducted.

The bill before us would ignore this robust outreach effort and waste millions of taxpayer dollars by requiring EPA to repeat outreach that has already been carried out. This is unnecessary and wasteful and does nothing to ensure American families and businesses have clean water.

Instead of advancing a bill that would allow more pollution of the nation's waterways, we should listen to the wide variety of stakeholders that support the proposed clean water rule. A poll released last month shows that 78% think Congress should allow the rule to move forward. In addition, a July 2014 poll found that 80% of small business owners support protections for upstream headwaters and wetlands in the proposed clean water rule.

It is time to restore much-needed certainty, consistency, and effectiveness to the Clean Water Act. S. 1140 does just the opposite. It would result in further delay, more uncertainty, and less protection for our nation's waterways.

Senator INHOFE. Thank you, Senator Boxer.

We have reached an agreement that we are going to consider the Manager's Amendment to S. 1140 with members amending that document. These amendments that come in will be to that document I just described.

I want to ask members to keep in mind, we have to have a quorum of 11 in order to pass this, but our amendments only need 7. Right now we have 8, so we are going to go through these as quickly as possible. We have 11 amendments out there and I want to ask which members seek recognition to each amendment and allow each member to call up his own amendment. We can have committee counsel available at the table to answer questions. At the conclusion of the members' statements and questions, we will vote on each amendment.

I would like to start by asking Senator Barrasso if he would like to make comments about the underlying bill which is the Manager's Amendment.

**OPENING STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM THE STATE OF WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman. I do appreciate your holding a markup on this bipartisan, pro-environmental protection, pro-small business legislation.

S. 1140, the Federal Water Quality Protection Act is legislation I introduced along with Democratic Senators, Senator Donnelly, Heitkamp, Manchin, along with other members of this committee, including you, Mr. Chairman. This is legislation that will protect our Nation's navigable waterways, the streams and wetlands that help keep our navigable waters clean.

This bill is a testament to the hard work that both sides of the aisle have done in achieving an agreement on an environmental protection bill. Our rivers, lakes, wetlands and other waterways are among America's most treasured resources.

In my home State of Wyoming, we have some of the most beautiful rivers in the world, the Snake River, the Wind River and dozens of others. The people of Wyoming voted to keep these waterways safe and pristine for their children and grandchildren. They understand there is a right way and a wrong way to do this. It is possible to have reasonable regulations to help preserve our waterways while still respecting the difference between State waters and Federal waters.

Unfortunately, the rule the EPA has released does not do that. In fact, the rule is actually worse than the proposed rule. This is important because many of my colleagues have been waiting for the rule to be released and gave the Administration the benefit of the doubt.

I am here to tell you that no matter what concessions EPA has claimed, they added new provisions that greatly expand their authority. For example, instead of clarifying the difference between a stream and erosion of the land, the rule defines tributaries to include any place where EPA thinks it sees an ordinary high water mark. What looks like, not what is, but the EPA says what looks like a high water mark.

Even worse, EPA proposes to make these decisions from their desks using aerial photographs and laser generated images claiming a field visit is not necessary. Under the rule, the Environmental Protection Agency also has the power to regulate something as “waters of the United States” if it falls within a 100-year floodplain or if it is within 400 feet of navigable water or a tributary and EPA claims there is a significant nexus.

Under this rule, significant nexus means a water feature that provides “life-cycle dependent aquatic habitat for a species.” If you start drawing 4,000 foot circles around everything the EPA identifies as a tributary and everywhere there is a potential aquatic habitat for birds and fish in that area, I expect nearly the whole Country would be included.

Mr. Chairman, this is not just me, this is from the economic analysis of the EPA-Army Clean Water Rule, May 2015, this year. This is what the EPA says to confirm my suspicions. “The agencies have determined that the vast majority of the Nation’s water,” the Nation’s water, not the States’ water, not the counties’ water, not local water, but the Nation’s water, they think they own it all, “the Nation’s water features are located within 4,000 feet of a covered tributary, traditional navigable water, interState water or territorial sea. We believe, therefore, that very few waters will be located outside of 4,000 feet and within 100-year floodplain.” They believe they can control it all.

Mr. Chairman, in addition, the final rule exempts puddles. They define that as very small, shallow and highly transitory pools of water that forms on pavements, that is good, or upland during and immediately after a rainstorm or similar precipitation event. It does specifically include other pools of water created by rain such as prairie potholes, vernal pools, even if the land where these pools of water form is far away from any navigable water or even a tributary.

Since the Supreme Court issued its 2001 decision in the Swank case, none of these isolated pools of water have been found to be jurisdictional applying a case by case analysis. Under this new regulation, nearly all of them will be considered waters of the United States, giving the Environmental Protection Agency the power to regulate what you do on that land.

These provisions are sweeping and will create uncertainty in communities all across America. Rather than support an EPA rule that is actually worse than the proposed rule and does not represent the interests of our farmers, ranchers, families and communities, let us move forward with this bipartisan Federal Water Quality Protection Act to assure the public that we hear and we understand their concerns. At the same time, let us give EPA and the Army Corps the certainty they need to confidently move forward with a new rule that truly reflects the needs of the constituents that we represent.

Thank you, Mr. Chairman. I urge my colleagues to vote yes on this bipartisan piece of legislation.

[The text of S. 1140 follow:]

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Federal Water Quality
- 5 Protection Act”.
- 6 **SEC. 2. FINDINGS.**
- 7 Congress finds that—
- 8 (1) in section 101(b) of the Federal Water Pol-
- 9 lution Control Act (33 U.S.C. 1251(b)), Congress
- 10 adopted the principle of cooperative federalism, rec-
- 11 ognizing that “[i]t is the policy of the Congress to

2

1 recognize, preserve, and protect the primary respon-
2 sibilities and rights of States to prevent, reduce, and
3 eliminate pollution, to plan the development and use
4 (including restoration, preservation, and enhance-
5 ment) of land and water resources, and to consult
6 with the Administrator in the exercise of his author-
7 ity under this Act”;

8 (2) adequate consultation with States and local
9 governments and affected entities is necessary—

10 (A) to ensure that Federal departments
11 and agencies understand the scope and impacts
12 of regulatory proposals;

13 (B) to maintain the cooperative federalism
14 foundation of the Federal Water Pollution Con-
15 trol Act (33 U.S.C. 1251 et seq.); and

16 (C) to respect the limits on Federal au-
17 thority;

18 (3)(A) States have robust water quality protec-
19 tion programs capable of greater regulatory controls
20 on waters not covered by Federal jurisdiction; and

21 (B) an exclusion of waters from Federal juris-
22 diction does not mean that excluded waters will be
23 exempt from regulation and protection, but rather,
24 it recognizes the limits of Federal jurisdiction under
25 the Federal Water Pollution Control Act (33 U.S.C.

1 1251 et seq.) and the primary role of States in pro-
2 tecting State waters; and

3 (4) subchapter II of chapter 5, and chapter 7,
4 of title 5, United States Code (commonly known as
5 the “Administrative Procedure Act”), requires each
6 agency to provide notice and an opportunity to com-
7 ment regarding—

8 (A) information, including scientific and
9 technical findings, on which the agency relies in
10 taking a regulatory action; and

11 (B) definitions, exclusions, and standards
12 that determine the limits of Federal regulation.

13 **SEC. 3. DEFINITIONS.**

14 In this Act:

15 (1) ADMINISTRATOR.—The term “Adminis-
16 trator” means the Administrator of the Environ-
17 mental Protection Agency.

18 (2) BODY OF WATER.—The term “body of
19 water” means a traditional navigable water, terri-
20 torial sea, river, stream, lake, pond, or wetlands.

21 (3) INTERSTATE WATERS.—The term “inter-
22 state waters” means the water described in section
23 328.3(a)(2) of title 33, Code of Federal Regulations
24 (as in effect on the day before the date of enactment
25 of this Act).

4

1 (4) ISOLATED.—The term “isolated”, with re-
2 spect to a body of water, means the absence of a
3 surface hydrologic connection to a traditional navi-
4 gable water.

5 (5) MUNICIPALITY.—The term “municipality”
6 means a city, town, borough, county, parish, district,
7 association, or other public entity that—

8 (A) was established by, or pursuant to,
9 State law; and

10 (B) has authority over the distribution of
11 water or the disposal of sewage, industrial
12 waste, or any other waste.

13 (6) NORMAL YEAR.—The term “normal year”
14 means—

15 (A) the 30-year hydrologic normal, as that
16 term is used by the Natural Resources Con-
17 servations Service of the Department of Agri-
18 culture, based on data from a specific geo-
19 graphic area; or

20 (B) if less than 30 years of data described
21 in subparagraph (A) are available, the average
22 of the observed monthly data from a specific ge-
23 ographic area over the period of record.

24 (7) POINT SOURCE.—The term “point source”
25 has the meaning given the term in section 502 of the

5

1 Federal Water Pollution Control Act (33 U.S.C.
2 1362).

3 (8) PUBLIC NOTICE AND AN OPPORTUNITY FOR
4 COMMENT.—

5 (A) IN GENERAL.—The term “public no-
6 tice and an opportunity for comment” means
7 notice and opportunity for comment that meets
8 the requirements of subchapter II of chapter 5,
9 and chapter 7, of title 5, United States Code
10 (commonly known as the “Administrative Pro-
11 cedure Act”).

12 (B) INCLUSION.—The term “public notice
13 and an opportunity for comment” includes the
14 opportunity for public hearings in different geo-
15 graphic regions with different hydrology, includ-
16 ing separate meetings in the arid West.

17 (9) SECRETARY.—The term “Secretary” means
18 the Secretary of the Army.

19 (10) STREAM.—The term “stream” means a
20 natural channel formed by the flow of water that has
21 a bed, bank, and ordinary high water mark (as de-
22 fined in section 328.3(e) of title 33, Code of Federal
23 Regulations (as in effect on the date of enactment
24 of this Act)).

25 (11) SURFACE HYDROLOGIC CONNECTION.—

6

1 (A) IN GENERAL.—The term “surface hy-
2 drologic connection” means a continuous sur-
3 face connection through which water moves
4 within a body of water or from 1 body of water
5 to another.

6 (B) EXCLUSION.—The term “surface hy-
7 drologic connection” does not include—

8 (i) overland flow of water outside a
9 body of water (including sheetflow); or

10 (ii) the movement of water through
11 soil, subsurface tiles, or a groundwater aq-
12 uifer.

13 (C) DETERMINATION OF CONTINUOUS-
14 NESS.—For purposes of this paragraph, a sur-
15 face hydrologic connection shall be considered
16 to be continuous if the connection is continuous,
17 regardless of whether—

18 (i) water is not always present; and

19 (ii) there is a break in the ordinary
20 high water mark of a stream that is unre-
21 lated to the flow regime of the stream, in-
22 cluding a break caused by a culvert, pipe,
23 dam, or by the flow of the stream under-
24 ground for a short distance, such as
25 through a cave.

1 (12) TRADITIONAL NAVIGABLE WATER.—The
2 term “traditional navigable water” means the water
3 described in section 328.3(a)(1) of title 33, Code of
4 Federal Regulations (as in effect on the date of en-
5 actment of this Act).

6 (13) WETLANDS.—The term “wetlands” has
7 the meaning given the term in section 328.3(b) of
8 title 33, Code of Federal Regulations (as in effect on
9 the date of enactment of this Act).

10 **SEC. 4. REVISED DEFINITION; PRINCIPLES AND PROCESS.**

11 (a) REVISED DEFINITION.—A revision to or guidance
12 on a regulatory definition of the term “navigable waters”
13 or “waters of the United States” promulgated or issued
14 pursuant to the Federal Water Pollution Control Act (33
15 U.S.C. 1251 et seq.) after February 4, 2015, shall have
16 no force or effect—

17 (1) unless the revision adheres to the principles
18 under subsection (b); and

19 (2) until after the Secretary and the Adminis-
20 trator carry out each action described in subsection
21 (c).

22 (b) PRINCIPLES.—In promulgating a revised regu-
23 latory definition pursuant to this subsection, the Secretary
24 and the Administrator shall adhere to the following prin-
25 ciples:

1 (1) The Federal Water Pollution Control Act
2 (33 U.S.C. 1251 et seq.) is an Act to protect tradi-
3 tional navigable waters from water pollution.

9 (A) traditional navigable waters and inter-
10 state waters;

(i) identified on 1 or more maps created using the United States Geological Survey National Hydrology Dataset Plus at the 1:100,000 scale from Reach Address Database Version 3.1, consistent with the scale and reach address database used by the Administrator during July 2009, in conjunction with information on drinking water source protection areas, to identify potential sources of water for public drinking water systems; or

1 United States Geological Survey National
2 Hydrology Dataset Plus at the available
3 scale that is closest to the scale described
4 in clause (i);

5 (C) the reach of a stream that, through a
6 surface hydrologic connection, contributes flow
7 in a normal year to a traditional navigable
8 water of sufficient volume, duration, and fre-
9 quency that pollutants in that reach would de-
10 grade the water quality of the traditional navi-
11 gable water, based on a quantifiable and statis-
12 tically valid measure of flow for that geographic
13 area; and

14 (D) wetlands situated next to a water of
15 the United States that, in a normal year, pro-
16 tect the water quality of a navigable water by
17 preventing the movement of pollutants to a nav-
18 igable water.

19 (3) The term “waters of the United States”
20 under the Federal Water Pollution Control Act (33
21 U.S.C. 1251 et seq.) should not include—

22 (A) water that is located below the surface
23 of the land, including soil water and ground-
24 water;

10

1 (B) water that is not located within a body
2 of water;

3 (C) an isolated pond, whether natural or
4 manmade, including a farm pond, fish pond,
5 quarry, mine pit, ornamental pond, swimming
6 pool, construction pit, fire control pond, sedi-
7 ment pond, and any other isolated facility or
8 system that holds water;

9 (D) a system constructed or used for the
10 purpose of collecting, conveying, holding, or
11 treating—

12 (i) stormwater or floodwater within
13 the boundaries of a State, tribal, munic-
14 ipal, industrial, agricultural, silvicultural,
15 residential, or Federal facility or operation,
16 including ditches along agricultural fields,
17 roads, runways, parking lots, and other in-
18 frastructure;

19 (ii) wastewater within the boundaries
20 of a State, tribal, municipal, industrial,
21 commercial, agricultural, silvicultural, resi-
22 dential, or Federal facility or operation;

23 (iii) municipal and industrial water
24 supplies within the boundaries of a State,
25 tribal, municipal, industrial, commercial,

11

1 agricultural, silvicultural, residential, or
2 Federal facility or operation—

3 (I) including spreading basins for
4 aquifer storage and recovery or aqui-
5 fer recharge and recovery; but

6 (II) not including instream res-
7 ervoirs or other instream facilities; or

8 (iv) water for agricultural or silvicultural
9 purposes by a municipality or at an
10 agricultural or silvicultural facility or oper-
11 ation, including irrigation water, a fish
12 production pond, livestock watering pond,
13 irrigated field, cranberry growing field, rice
14 production field, manure lagoon, and farm
15 pond;

16 (E) the reach of a stream that, through a
17 surface hydrologic connection, does not con-
18 tribute flow in a normal year to a traditional
19 navigable water of sufficient volume, duration,
20 and frequency that pollutants in that reach
21 would degrade the water quality of the tradi-
22 tional navigable water, based on a quantifiable
23 and statistically valid measure of flow for that
24 geographic area;

1 (F) prior-converted cropland (as defined in
2 section 12.2(a) of title 7, Code of Federal Reg-
3 ulations (as in effect on the date of enactment
4 of this Act)); and

5 (G) any water that is no longer a water of
6 the United States pursuant to a permit issued
7 under—

8 (i) section 10 of the Act of March 3,
9 1899 (commonly known as the “Rivers and
10 Harbors Appropriation Act of 1899”) (33
11 U.S.C. 403); or

12 (ii) section 404 of the Federal Water
13 Pollution Control Act (33 U.S.C. 1344).

14 (4) Unless a subparagraph of paragraph (3)
15 other than subparagraph (D) applies, for purposes
16 of the Federal Water Pollution Control Act (33
17 U.S.C. 1251 et seq.), the term “waters of the United
18 States” should include a system described in para-
19 graph (3)(D), or a component of such a system, if
20 the Secretary or the Administrator demonstrates
21 that—

22 (A) the system or component was a water
23 of the United States that was converted for use
24 for the purpose described in paragraph (3)(D)
25 after the effective date of initial regulations im-

1 plementing section 404 of that Act (33 U.S.C.
2 1344), without a permit under that section un-
3 less the construction or use of the system or
4 component—

14

1 exempt from permitting under section
2 502(14) of that Act (33 U.S.C.
3 1362(14));

4 (iii) the construction or use of the sys-
5 tem or component is described in subpara-
6 graph (A) or (C) of section 404(f)(1) of
7 that Act (33 U.S.C. 1344(f)(1)); or

8 (iv) the system or component is a
9 waste treatment system.

10 (5) In promulgating a revised definition of
11 waters of the United States, the Secretary and the
12 Administrator shall take into consideration that—

13 (A) the use of a body of water by an orga-
14 nism, including a migratory bird, does not pro-
15 vide a basis for establishing Federal jurisdiction
16 under the Federal Water Pollution Control Act
17 (33 U.S.C. 1251 et seq.);

18 (B) the supply of water to a groundwater
19 aquifer and the storage of water in an isolated
20 body of water are issues that—

21 (i) pertain to the use of water re-
22 sources that shall not be superseded, abro-
23 gated, or otherwise impaired by the Fed-
24 eral Water Pollution Control Act (33
25 U.S.C. 1251 et seq.) pursuant to sections

1 101(g) and 510(2) of that Act (33 U.S.C.
2 1251(g), 1370(2)); and

3 (ii) do not provide a basis for estab-
4 lishing Federal jurisdiction under that Act
5 (33 U.S.C. 1251 et seq.); and

6 (C) evaporation, transpiration, condensa-
7 tion, precipitation, the overland flow of water,
8 and the movement of water in an aquifer are all
9 part of the water cycle and may connect all
10 water over sufficiently long periods of time and
11 distances, but do not provide a basis for estab-
12 lishing Federal jurisdiction under the Federal
13 Water Pollution Control Act (33 U.S.C. 1251 et
14 seq.).

15 (6) Waters that are waters of the United States
16 should be identified on maps provided by the Sec-
17 retary and the Administrator to promote certainty
18 and transparency in jurisdictional determinations.

19 (c) CONSIDERATION, CONSULTATION, AND RE-
20 PORT.—

21 (1) FEDERALISM.—

22 (A) IN GENERAL.—In proposing and pro-
23 mulgating a regulation pursuant to subsection
24 (a), the Secretary and the Administrator shall
25 ensure compliance with the federalism policy-

16

1 making criteria and consultation in accordance
2 with Executive Order 13132 (64 Fed. Reg.
3 43255 (August 4, 1999)), regardless of whether
4 the Secretary and the Administrator determine
5 that the regulation would have any substantial
6 and direct effect on—

7 (i) States;

8 (ii) the relationship between the Fed-
9 eral Government and the States; or

10 (iii) the distribution of power and re-
11 sponsibilities among the various levels of
12 government.

13 (B) CONSULTATION.—

14 (i) IN GENERAL.—To be considered
15 meaningful consultation described in sec-
16 tion 101(b) of the Federal Water Pollution
17 Control Act (33 U.S.C. 1251(b)), before
18 publication of a proposed rule under this
19 section, consultation shall include a discus-
20 sion of alternative approaches with and a
21 request for input and advice on the ap-
22 proaches from States and political subdivi-
23 sions of States, including—

24 (I) Governors;

17

1 (II) State departments with au-
2 thority over water supply and water
3 quality;

4 (III) State departments of agri-
5 culture; and

6 (IV) local governments, including
7 elected officials, local governmental
8 entities with authority over water sup-
9 ply, stormwater, waste water, flood-
10 plain management, and flood control,
11 irrigation districts, and conservation
12 districts.

13 (ii) TOPICS.—The topics to be ad-
14 dressed in the consultation under this
15 paragraph should include—

16 (I) categories of waters, in addi-
17 tion to those discussed in paragraphs
18 (2) and (3) of subsection (b), that
19 should be subject to Federal jurisdic-
20 tion or should be subject solely to
21 State or local regulation;

22 (II) what is the role of States in
23 the identification of waters subject to
24 Federal jurisdiction; and

1 (III) whether channels in which
2 water is present only during or for a
3 short time after a precipitation event
4 are correctly categorized as
5 geomorphological features rather than
6 hydrologic features.

7 (2) REGULATORY FLEXIBILITY.—In proposing
8 and promulgating a regulation pursuant to sub-
9 section (a), and regardless of whether the Secretary
10 and the Administrator determine that the regulation
11 would have a significant impact on a substantial
12 number of small entities, the Secretary and the Ad-
13 ministrator shall—

14 (A) carry out the actions described in sec-
15 tions 603, 604, and 609 of title 5, United
16 States Code; and

17 (B) in carrying out those actions, take into
18 consideration the costs of all programs under
19 the Federal Water Pollution Control Act (33
20 U.S.C. 1251 et seq.), regardless of whether the
21 Secretary and the Administrator consider the
22 costs of the proposed regulation to be direct or
23 indirect.

24 (3) UNFUNDED MANDATES.—In proposing and
25 promulgating a regulation pursuant to subsection

1 (a), the Secretary and the Administrator shall evalu-
2 ate the intergovernmental and private sector impacts
3 of the regulation, in accordance with title II of the
4 Unfunded Mandates Reform Act of 1995 (2 U.S.C.
5 1531 et seq.), regardless of whether the Secretary
6 and the Administrator—

7 (A) consider the impacts of the proposed
8 regulation to be direct or indirect; or

9 (B) determine that expenditures resulting
10 from the proposed regulation would meet the
11 monetary thresholds established in that Act (2
12 U.S.C. 1501 et seq.).

13 (4) IMPROVING REGULATION AND REGULATORY
14 REVIEW.—In proposing and promulgating a regula-
15 tion pursuant to subsection (a), regardless of wheth-
16 er the Secretary and the Administrator consider the
17 regulation to be a significant regulatory action or
18 significantly affect State, local, and tribal govern-
19 ments, the Secretary and the Administrator shall en-
20 sure that the regulation meets the requirements of—

21 (A) Executive Order 12866 (5 U.S.C. 601
22 note; relating to regulatory planning and re-
23 view); and

24 (B) Executive Order 13563 (76 Fed. Reg.
25 3821 (January 18, 2011)).

1 (5) IMPROVING PERFORMANCE OF FEDERAL
2 PERMITTING AND REVIEW OF INFRASTRUCTURE
3 PROJECTS.—In proposing and promulgating a regu-
4 lation pursuant to subsection (a), the Secretary and
5 the Administrator shall consider—

6 (A) Executive Order 13604 (5 U.S.C. 601
7 note; relating to improving performance of Fed-
8 eral permitting and review of infrastructure
9 projects); and

10 (B) the goal of reducing the time to make
11 decisions in the permitting and review of infra-
12 structure projects by the Federal Government.

13 (6) REPORT.—Not later than the date that is
14 30 days before the date of issuance of a proposed
15 regulation pursuant to subsection (a), the Secretary
16 and the Administrator shall submit to the Com-
17 mittee on Environment and Public Works of the
18 Senate and the Committee on Transportation and
19 Infrastructure of the House of Representatives a re-
20 port that—

21 (A) describes the means by which the pro-
22 posed regulation, if finalized, would achieve
23 compliance with—

24 (i) Executive Order 12866 (5 U.S.C.
25 601 note; relating to regulatory planning

21

1 and review), including the means by
2 which—

3 (I) the regulation would impose
4 the least burden on society, consistent
5 with obtaining regulatory objectives,
6 taking into account, among other
7 things, and to the maximum extent
8 practicable, the costs of cumulative
9 regulations; and

10 (II) the Secretary and the Ad-
11 ministrator identified and assessed
12 available alternatives to direct regula-
13 tion;

14 (ii) section 2(i) of Executive Order
15 13132 (64 Fed. Reg. 43256 (August 4,
16 1999)), which requires agencies to “act
17 only with the greatest caution where State
18 or local governments have identified uncer-
19 tainties regarding the constitutional or
20 statutory authority of the national govern-
21 ment”;

22 (iii) section 3 of that Executive order
23 (64 Fed. Reg. 43256 (August 4, 1999)),
24 which requires agencies—

22

1 (I) to strictly adhere to constitu-
2 tional principles and statutory author-
3 ity;

4 (II) to take action limiting the
5 policymaking discretion of the States
6 only in cases in which there exists
7 constitutional and statutory authority
8 for the action;

9 (III) to provide States with max-
10 imum administrative discretion prac-
11 ticable, without intrusive Federal
12 oversight; and

13 (IV) to rely on State policies to
14 the maximum extent practicable; and

15 (iv) Executive Order 13563 (76 Fed.
16 Reg. 3821 (January 18, 2011)), including
17 the public participation requirements of
18 section 2 of that Executive order, which re-
19 quire an opportunity for public comment
20 regarding all pertinent parts of the rule-
21 making docket, including relevant scientific
22 and technical findings and seeking the
23 views of those who are likely to be affected
24 before issuing a notice of proposed rule-
25 making;

1 (B) includes the Federalism summary im-
2 pact statement required by section 3 of Execu-
3 tive Order 13132 (64 Fed. Reg. 43256 (August
4 4, 1999));

5 (C) includes the regulatory flexibility anal-
6 yses required under section 603 of title 5,
7 United States Code, and the report of the re-
8 view panel required under section 609 of that
9 title;

10 (D) describes the small government agency
11 plan, and the State, local, and tribal input
12 under sections 203 and 204 of the Unfunded
13 Mandates Reform Act of 1995 (2 U.S.C. 1533,
14 1534);

15 (E) describes the means by which the pro-
16 posed regulation is the least costly, most cost-
17 effective, or least burdensome alternative, in ac-
18 cordance with section 205 of the Unfunded
19 Mandates Reform Act of 1995 (2 U.S.C. 1535);

20 (F) describes whether the Secretary and
21 the Administrator will provide funding to State,
22 local, and tribal governments to meet the inter-
23 governmental mandates imposed by the pro-
24 posed regulation; and

1 (G) describes how the proposed rule will
2 achieve the goal stated in section 1 of Executive
3 Order 13604 (5 U.S.C. 601 note; relating to
4 improving performance of Federal permitting
5 and review of infrastructure projects) that the
6 time to make decisions in the permitting and
7 review of infrastructure projects by the Federal
8 Government be reduced.

9 (7) TIMING.—In carrying out this section, the
10 Secretary and the Administrator shall use best ef-
11 forts—

12 (A) to provide not less than 180 days for
13 the consultation described in paragraph (2);

14 (B) to provide a comment period on the re-
15 vised proposed rule of not less than 120 days;
16 and

17 (C) to publish a final rule not later than
18 December 31, 2016.

19 **SEC. 5. MEASURE OF FLOW.**

20 After providing public notice and an opportunity for
21 comment, the Secretary shall establish quantifiable and
22 statistically valid measures of the volume, duration, and
23 frequency of flow in streams in different geographic areas
24 that would, in a normal year, allow pollutants in reaches

1 of streams in those geographic areas to flow to and de-
2 grade the water quality of a traditional navigable water.

3 **SEC. 6. REPORT TO CONGRESS.**

4 Not later than the date that is 3 years after the date
5 of promulgation of a regulation pursuant to section 4, and
6 not less frequently than once every 3 years thereafter, the
7 Comptroller General of the United States, after consulta-
8 tion with State, local, and tribal governments and other
9 affected entities, shall—

10 (1) review the jurisdictional determinations
11 made during the applicable period by the Secretary
12 and the Administrator; and

13 (2) submit to Congress a report that de-
14 scribes—

15 (A) the interpretations of the regulation
16 by—

17 (i) districts of the Corps of Engineers;

18 and

19 (ii) regional offices of the Environ-
20 mental Protection Agency;

21 (B) whether those interpretations are con-
22 sistent;

23 (C) if any inconsistency exists, the meas-
24 ures carried out by the Secretary and the Ad-
25 ministrator to reduce the inconsistency or an

1 explanation of the geographic differences that
2 make the inconsistency appropriate; and

3 (D) the impacts of those interpretations on
4 Federal permitting and review of infrastructure
5 projects, and the goal stated in section 1 of Ex-
6 ecutive Order 13604 (5 U.S.C. 601 note; relat-
7 ing to improving performance of Federal per-
8 mitting and review of infrastructure projects)
9 that the time to make decisions in the permit-
10 ting and review of infrastructure projects by the
11 Federal Government be reduced.

12 **SEC. 7. EFFECT OF ACT.**

13 (a) PERMITTING AUTHORITY.—Nothing in this Act
14 limits the authority of the Secretary or the Adminis-
15 trator—

16 (1) to require a permit for any discharge of pol-
17 lutants to a navigable water under the Federal
18 Water Pollution Control Act (33 U.S.C. 1251 et
19 seq.); or

20 (2) to take any enforcement action with respect
21 to an unpermitted discharge under that Act.

22 (b) WATER TRANSFERS.—Nothing in this Act affects
23 a determination regarding whether the transfer of water
24 from 1 body of water to another requires a permit under

1 section 402 of the Federal Water Pollution Control Act
2 (33 U.S.C. 1342).

3 (c) RETENTION OF STATE AUTHORITY.—Nothing in
4 this Act places any limitation on the scope of water subject
5 to State jurisdiction under State law.

Senator INHOFE. Thank you, Senator Barrasso.

Does any member seek recognition for an amendment? Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman.

I would offer Cardin-Boxer Amendment No. 1.

Senator INHOFE. Cardin-Boxer Amendment No. 1, you are recognized.

**OPENING STATEMENT OF HON. BENJAMIN CARDIN,
U.S. SENATOR FROM THE STATE OF MARYLAND**

Senator CARDIN. Thank you.

Mr. Chairman and members of the committee, our responsibility is to make sure that we protect the public from polluters. So when we talk about burdens on different segments and so forth, we want to make sure our regulatory structure is fair to all.

Make no mistake, our burden and our responsibility is on the public health of the people of this Country. That is why on a bipartisan basis, we enacted the Clean Water Act to protect public health. We do not want to go back to rivers catching fire and the circumstances that Senator Boxer alluded to in her opening comments.

I oppose the bill that is before us. Two weeks ago, the Environmental Protection Agency and the Army Corps responded to the challenge laid down by the Supreme Court a decade ago. That decision created uncertainty in case by case determinations as to what waters would be regulated under the Clean Water Act and reinstated a science-based protection using sound, peer reviewed scientific data for clean water.

That is exactly what we want them to do, to use science, to use the best data available to protect the public and make sure that we have clean water.

For the first time ever, the regulation spells out with clarity those waters that are not subject to the Clean Water Act and adopted a narrower working definition of waters of the U.S. than was the working use prior to the Supreme Court decision. They listened to the comments made during the review process as Senator Boxer pointed out. They listened to the million comments made and tailored a rule that complies with its responsibility to protect the public in regards to clean water. They listened to the reasonable concerns expressed by the stakeholders.

Therefore, the legislation we have before us, if not amended, will send EPA and the Army Corps back to the drawing board and create uncertainty once again where there will not be clarity as to what is subject to the Clean Water Act because we have denied the agencies moving forward and Congress has not adopted the certainty as to what is subject to the Clean Water regulations. We are talking about wetlands and tributaries that affect the clean water.

The amendment I have offered, first, corrects a mistake in the underlying bill. The goal of the Clean Water Act is not as stated in the bill before us, to protect traditional navigable waters from water pollution. That is not the goal stated in the Clean Water Act. The goal is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.

My amendment corrects the misstatement contained in the underlying bill but then goes to I think the heart of what I hope all of us would agree. That is, the provisions will not be effective if the Administrator and Secretary determine the implementation of the provisions is likely to increase the probability of exposure to discharges of toxins and pollutants in amounts that could adversely impact the health and welfare of persons served by public drinking water systems, including infants, children, pregnant women, the elderly and other vulnerable populations. I say that because we are all subject to having clean water in our environment but those particularly susceptible are the most vulnerable, our children, our elderly and vulnerable populations.

Second, the amendment says if it would compromise the safety or heighten the risk of illness from consumption of fish or swimming, that also would be taken into consideration as far as the implementation of this bill.

Mr. Chairman, I would hope my colleagues would accept this amendment. I remember in some of my previous years in the House of Representatives, Democrats and Republicans joined together in the proud tradition of this Country to protect the public. In every Congress, we looked at ways we could build upon the success of the past to protect public health so communities felt safe in their community with clean water, and I might also add clean air. I think my amendment makes it clear that we will put public health first and carry out the burden that we have to protect the public health.

[The text of Cardin-Boxer Amendment No. 1 follow:]

Cardin- Boxer 1:

SUMMARY: An amendment to insert the actual goals of the Clean Water Act as they are stated in Sec. 101 (33 U.S.C. 1251) of the Clean Water Act and to assure the Act adequately protects public health.



WE115617

S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To improve the bill.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.**S. 1140**

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term "waters of the United States", and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by Mr. CARDIN (for
himself and Mrs. BOXER)

Viz:

1 On page 8, lines 2 and 3, strike "is an Act to protect
2 traditional navigable waters from water pollution." and in-
3 sert "states in section 101 of the Act (33 U.S.C. 1251
4 et seq.) that—

5 "(a) The objective of this Act is to restore and main-
6 tain the chemical, physical, and biological integrity of the
7 Nation's waters. In order to achieve this objective it is
8 hereby declared that, consistent with the provisions of this
9 Act—

2

1 “(1) it is the national goal that the discharge
2 of pollutants into the navigable waters be eliminated
3 by 1985;

4 “(2) it is the national goal that wherever at-
5 tainable, an interim goal of water quality which pro-
6 vides for the protection and propagation of fish,
7 shellfish, and wildlife and provides for recreation in
8 and on the water be achieved by July 1, 1983;

9 “(3) it is the national policy that the discharge
10 of toxic pollutants in toxic amounts be prohibited;

11 “(4) it is the national policy that Federal finan-
12 cial assistance be provided to construct publicly
13 owned waste treatment works;

14 “(5) it is the national policy that areawide
15 treatment management planning processes be devel-
16 oped and implemented to assure adequate control of
17 sources of pollutants in each State;

18 “(6) it is the national policy that a major re-
19 search and demonstration effort be made to develop
20 technology necessary to eliminate the discharge of
21 pollutants into the navigable waters, waters of the
22 contiguous zone, and the oceans; and

23 “(7) it is the national policy that programs for
24 the control of nonpoint sources of pollution be devel-
25 oped and implemented in an expeditious manner so

1 as to enable the goals of this Act to be met through
2 the control of both point and nonpoint sources of
3 pollution.”.

4 At the end, add the following:

5 **SEC. 8. LIMITATION ON APPLICABILITY.**

6 The provisions of this Act shall cease to be effective
7 if the Administrator and the Secretary determine that the
8 implementation of the provisions is likely—

9 (1) to increase the probability of exposure to
10 discharges of toxic pollutants in amounts that could
11 adversely impact the health or welfare of persons
12 who are served by public drinking water systems, in-
13 cluding—

14 (A) infants;

15 (B) children;

16 (C) pregnant women;

17 (D) the elderly; and

18 (E) other vulnerable populations; or

19 (2) to compromise the safety of and heighten
20 the risk of illness from—

21 (A) consumption of fish; and

22 (B) swimming.

Senator INHOFE. Thank you, Senator Cardin.

Let me note a little bit on what he said. Senator Cardin and I were elected to the House in the same year. I remember very well and believe we have been doing just what you suggested over those some 28 years now.

I would only observe that this amendment does not amend the Clean Water Act but as you point out, sends it back to have areas where we feel it needs a lot of surgery worked out. I also am a little concerned about when we give the power to the Administrator and the Corps. I am not sure I have as much faith as you in their having that power.

I would ask for anyone who wants to be heard on this amendment? Senator Carper.

**OPENING STATEMENT OF HON. THOMAS CARPER,
U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thanks, Mr. Chairman.

Before us we have a bill authored by Senator Barrasso, who I think is one of our more thoughtful people, who is delightful to work with and to know. While I cannot support his proposal, I would say there are several aspects of his bill that do have merit. I want to mention a couple of them.

I think a report to Congress on how to ensure communities are not harmed intentionally by this new rule would be helpful to ensure EPA stays on the right track. I also believe that the concept of maps showing watersheds that must be protected is a good one as long as it is done thoroughly and carefully.

I commend him for trying to make an honest effort to address a couple of areas that need to be addressed.

Having said that, I have not been in lock step with EPA, none of us have, but I will say this. Gina McCarthy, the Administrator, has made a strong effort to be as open as I think she and the agency can be.

The idea of having a 200 day period in which to receive input is extraordinary. They did not just get a couple thousand recommendations for changes, they got a million. I think they made an honest effort to try to incorporate those into this final rule.

Is it perfect? No way, nothing is perfect. While we strive for perfection as our goal, we cannot be perfect. I am going to support Ben's amendment. I hope the rest of us will also.

At the end of the day, some of the things that Senator Barrasso has called for in his bill deserve support. While there are other pieces of the legislation that will not allow me to support it, I commend him for that effort.

I thank you, Mr. Chairman.

[The prepared statement of Senator Carper follows:]

Senator Tom Carper Statement
Environment & Public Works Committee Business Meeting to consider
S. 1140, Federal Water Quality Protection Act
June 10, 2015

“Protecting our national watersheds helps to ensure our country’s drinking water is safe, while investing in a resource that fuels both our local and national economies. The federal government’s best tools for accomplishing these goals are the authorities granted to it by the Clean Water Act. Since its enactment in 1972, the Clean Water Act has led to significantly cleaner water in this country. Before this law, only about 30 percent of our nation’s waters were safe to swim and fish. But today, that number has doubled to 60 percent. This is tremendous progress, but our work is not complete. Many waters in this country still fail to meet our health standards and need to be cleaned up further.

“We know that small streams and wetlands are where many of our rivers, bays, and coastal waters begin. Protecting these small streams and wetlands from pollutants and other harmful substances can have a huge impact on the safety of our drinking water. Providing that protection must be a top priority. After all, these water sources can reach more than 100 million people.

“But that’s not our only important concern. These small streams and wetlands provide critical habitats for fish and wildlife, provide water for our crops and livestock, and protect communities from rising floodwaters.

“We know the key to protecting these water sources is to start from the top. The precautions we take upstream result in healthy water downstream. However, protections for upstream water sources have dwindled over the past two decades as a result of court decisions that have created uncertainty, and due to the failure of Congress to provide clarity on the law.

“In an effort to ensure that the federal government is doing what it should to keep our water clean and safe, the Environmental Protection Agency (EPA) recently finalized the Waters of the United States rule. It seeks to clarify which wetlands and streams are critical upstream water sources that must be protected under the Clean Water Act in order to maintain safe quality standards in our rivers, bays and coastal waters.

“Today, this committee is considering legislation offered by our friend and colleague from Wyoming, Senator Barrasso, that would push the pause button on the EPA’s new rule in an effort to elicit even more clarity for the businesses and individuals that may be affected by the rule. I commend his hard work on this issue and appreciate his concern about the possibility of unintended consequences imposed by a new federal regulation. I believe we must always be mindful of placing any undue burden on our citizens.

“But the process to finalize this rule was not hasty – the EPA held open a period of public comment for more than 200 days. This lengthy comment period resulted in more than one million comments to the rule. In addition, the EPA and Army Corps of Engineers held more than 400 meetings with stakeholders across the country and visited farms in nine states. All of which

helped shaped the final rule for the better. In the final rule, the administration further clarified what streams and wetlands would be regulated, provided additional protections to the agriculture community, and focused protections on streams not ditches. I truly believe that the administration used this input to try to strike a balance between protecting the environment, public health, our agriculture communities, and our continued economic recovery.

“However, despite the administration’s genuine efforts, I would acknowledge that the final rule is not perfect. Indeed, I’m not sure that any of them are.

“One of my guiding principles is that if something isn’t perfect, we should endeavor to make it better. That certainly rings true for federal regulations. I’ve solicited input from my constituents in Delaware on how the rule could be improved and have consulted with our state’s Secretaries of Agriculture and Natural Resources and Environmental Control. This counsel has helped me understand that, despite the agriculture exemptions in the EPA’s regulation, there are still some concerns about which waterbodies and practices will be regulated. I know the EPA is still trying to address these concerns as it rolls out the regulation.

“Although I believe Senator Barrasso’s legislation is intended to address some of the uncertainties people have expressed with the EPA’s new rule, I also believe the legislation moves too far in the direction of rolling back critical protections. Therefore, I will not cast my vote today in its favor. While I won’t be supporting the legislation, I do think there are several aspects of his bill that do have merit. For example, I believe a report to Congress on how to ensure communities are not harmed unintentionally by this new rule would be helpful to ensure EPA is on the right track. I also believe that the concept of a map showing watersheds that must be protected is a good one, as long as it is drawn thoroughly and carefully.

“I believe principled compromise on tough issues is the only way we in Congress can do our jobs effectively, and I hope it’s what we will do on this issue. I look forward to working together in the days ahead with my colleagues on both sides of the aisle, and with the Obama Administration, to provide even greater clarity through this regulation and, by doing so, better ensuring that our country and its citizens end up with both cleaner water and a stronger economy.”

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Senator INHOFE. You will have that opportunity.

Senator BOXER. Let us go back and forth here.

Senator BOXER. That is fine.

Senator INHOFE. Those who want to be heard on the amendment from this side?

Senator Boxer.

Senator BOXER. Thank you so much.

I want to thank Senator Cardin for his work on this.

Mr. Chairman, here are the facts. These are the facts. This is not made up. This comes from American Rivers.

The EPA estimates that up to 3.5 million people fall ill from swimming in waters contaminated by sanitary sewer overflows every year. If we start taking streams out of this regulatory reach, if we start taking waters out, people can dump their sewage in there without any type of permit. We will see this number go up, including the 1.5 million people in California every year on the beaches.

We have some pretty strict regulations but even with that, people get sick from the untreated sewage. There are pathogens in the water. Cryptosporidium contaminated the drinking water supply in Milwaukee. In 1993, 400,000 people became ill and 100 people died because they were vulnerable.

Why on earth does the Environment Committee want to remove bodies of water from this rule where they can become filled with these pathogens? Toxic algae blooms, I know my friend has had direct experience with that. In addition to pathogens, the high nutrient levels in untreated sewage can cause illness when they create algae blooms. Symptoms from exposure include memory loss, vomiting, diarrhea, abdominal pain, liver failure, respiratory paralysis and even coma.

We are not talking about bureaucracy and EPA overreach. We are talking about how we can protect our people from these illnesses.

I will conclude with this, I think the Cardin amendment strikes a provision in S. 1140 that would essentially rewrite the objective of the Clean Water Act. My friend is right. It sends the rule back. But essentially, because frankly, I do not think the American people would stand for it 1 second if you tried to repeal the Clean Water Act, you would be voted out of office. They do not do that.

They play with this rule and rewrite the historic objective of the Act. The historic objective of the Act supported by Republicans and Democrats overwhelmingly 40 years ago says, we want to restore and maintain the chemical, physical and biological integrity of the Nation's waters. This is what Senator Cardin does. He restores this important definition.

The amendment also says that the Act is null and void if it would increase exposure to toxic pollution or increase the likelihood that people will get sick from consuming fish or swimming in recreational waters. Colleagues, that is the least we can do, protect peoples' health.

The amendment opposed the historic focus of the Clean Water Act and it does not undo the many achievements of the Act over the last four decades. I hope we can at least vote yes. Otherwise, the American people will see that a Clean Water Act has protected

them, even though it certainly has not been perfect. People have still gotten sick but we have protected people. We are one of the best in the world in this and that it is not being rescinded in part by this law. I urge a yes vote.

Senator INHOFE. Thank you, Senator Boxer.

Before recognizing Senator Barrasso to respond, does anyone else wish to be heard on this amendment?

Senator Barrasso.

Senator BARRASSO. Thank you, Mr. Chairman.

First, I want to specifically thank Senator Carper for his fine comments. We have worked closely together on a number of issues. He is an honest broker, continues to be, and it is a privilege to serve with him as a former Governor, a former U.S. Member of Congress and now as a Senator. He is someone that I think really understands his State, the needs and concerns there. I appreciate his kind comments.

Mr. Chairman, I do need to oppose the Cardin-Boxer Amendment No. 1. The bill I propose does not amend the Clean Water Act, so it does not amend Section 101 of the Act. It is not necessary to re-State those goals.

In addition, even though rivers and streams that are sources of drinking water are clearly protected by S. 1140, as are the wetlands next to those rivers and streams that serve to filter pollutants, this amendment, the Cardin-Boxer amendment, gives EPA the authority to vacate the entire bill with a spurious determination which is my specific concern.

This would result in the status quo, which is unacceptable to cities, towns, farmers, ranchers, small business owners, hardworking taxpayers and those who want clean water and their livelihoods all across the Country.

I would urge a no vote on this amendment.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso.

The Cardin-Boxer Amendment is before us.

Senator CARDIN. Can I close?

Senator INHOFE. Of course.

Senator CARDIN. Thank you, Mr. Chairman. I appreciate the opportunity to close.

Let me say, I share Senator Carper's observations that we need to work together. Senator Barrasso and I serve not only on this committee together but also on the Senate Foreign Relations Committee. We have been able to work together and sometimes we disagree.

Let me just point out what the bill says. It says, "The Federal Water Pollution Act is an Act to protect traditional navigable waters from water pollution." In fact, what the Clean Water Act says is it is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." That is what the Act says.

Senator Barrasso, your bill changes the Clean Water Act's fundamental principle to protect public health. You are changing it to say "to protect traditional navigable waters." That is a change, a significant change, a fundamental change in the Clean Water Act.

The reason why we underscored that with the rest of this bill is because this is what the Clean Water Act is about. The Clean

Water Act is about people who swim who know that we have regulations to protect their health. People who live near water know that we have regulations and a law to protect their health and that clean water is a national priority. That is what the Clean Water Act says.

I understand Senator Barrasso's intent, but that is not what the bill says. The bill changes the fundamental direction of the Clean Water Act in addition to stopping the agencies from moving forward on its regulations.

I would urge my colleagues to adopt this amendment.

Senator INHOFE. Thank you, Senator Cardin.

Is there a motion on the Cardin-Boxer Amendment No. 1?

Senator BOXER. So moved.

Senator INHOFE. Second.

All in favor, say aye.

[Chorus of ayes.]

Senator INHOFE. Opposed, no.

[Chorus of noes.]

Senator INHOFE. A roll call has been requested. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. No.

The CLERK. Mr. Booker?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Boozman?

Senator BOOZMAN. No.

The CLERK. Mrs. Boxer?

Senator BOXER. Aye.

The CLERK. Mrs. Capito?

Senator INHOFE. No by proxy.

The CLERK. Mr. Cardin?

Senator CARDIN. Aye.

The CLERK. Mr. Carper?

Senator CARPER. Aye.

The CLERK. Mr. Crapo?

Senator CRAPO. No.

The CLERK. Mrs. Fischer?

Senator FISCHER. No.

The CLERK. Mrs. Gillibrand?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Markey?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Merkley?

Senator MERKLEY. Aye.

The CLERK. Mr. Rounds?

Senator ROUNDS. No.

The CLERK. Mr. Sanders?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. No by proxy.

The CLERK. Mr. Sullivan?

Senator INHOFE. No by proxy.

The CLERK. Mr. Vitter?

Senator INHOFE. No by proxy.

The CLERK. Mr. Whitehouse?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Wicker?

Senator WICKER. No.

Senator INHOFE. I would remind the Clerk he did not call my name.

The CLERK. I am sorry. Mr. Chairman?

Senator INHOFE. No.

The CLERK. The yeas are 9 and the nays are 11.

Senator INHOFE. The amendment is not accepted.

Senator CARPER. I would ask unanimous consent that my statement be entered for the record at the appropriate place.

Senator INHOFE. Without objection, of course.

Senator CARPER. I am going to run back to Homeland Security. We are trying to get a TSA Administrator confirmed. I am going to run and do that.

Thanks so much.

Senator INHOFE. That is important.

Do other Senators have amendments?

Senator BOXER. I do.

Senator INHOFE. Senator Boxer.

Senator BOXER. I would call up Boxer No. 1.

Senator INHOFE. Boxer No. 1. Senator Boxer.

Senator BOXER. Thank you, Mr. Chairman.

My amendment ensures that the Secretary of the Army and the Administrator of the EPA retain their authority to protect our Nation's drinking water supply.

The Clean Water Act is a critical tool for preventing pollution of water bodies that provide drinking water. The final Clean Water Rule protects streams and wetlands that provide drinking water to 1 in 3 Americans. S. 1140, the bill before us, would block this important rule and the protection it provides for our drinking water.

This amendment is very simple. It simply says that nothing in this bill affects the Secretary and Administrator's authority to protect sources of drinking water. Colleagues, that is the least we can do, the least we can do.

I hope we can all agree the EPA and the Corps should retain the authority to ensure that our drinking water supply is safe and clean.

I urge my colleagues to vote yes on this amendment.

[The text of Boxer Amendment No. 1 follows:]

WEI15601

S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To clarify the authority of the Administrator of the Environmental Protection Agency and the Secretary of the Army to protect the quality of surface water that is available for public water supplies.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

1 At the end, add the following:

2 **SEC. 8. PROTECTION OF QUALITY OF SURFACE WATER FOR**
3 **PUBLIC WATER SUPPLIES.**

4 Nothing in this Act affects the authority of the Ad-
5 ministrator or the Secretary to protect the quality of sur-
6 face water that is available for public water supplies.

Senator INHOFE. Thank you, Senator Boxer.

Let me observe that I have the same problem with this amendment that I had with the last one, because you are saying they are without a lot of guidelines, able to have that power. I would object to this amendment.

Does anyone want to be heard? Senator Cardin.

Senator CARDIN. Thank you.

I support the Boxer Amendment. Mr. Chairman, when our constituents turn on their tap or go to their wells, they expect the water they are drinking is safe. I do not know of a more fundamental responsibility we have than to make sure that, in fact, is real.

The truth is that as we are chipping away at the protections we have on clean water and clean air. A lot of assumptions made by people in this Country are not necessarily accurate. You have seen recent reports that are challenging, in some cases, the safety of drinking water.

This amendment is so straightforward and commonsense. It does not stop what Senator Barrasso is trying to do in his bill. It just says we have to guarantee we are doing everything we possibly can to make sure when you turn on the tap, the water is safe.

It seems to me that at a bare minimum, we should have broad support, if not unanimous support, for this amendment. I do not quite understand the Chair's objections to saying that the agency responsible for clean water, you cannot trust to make sure we have safe drinking water. I do not understand the logic of that argument.

Senator INHOFE. Thank you, Senator Cardin.

Do others want to be heard? If not, Boxer Amendment No. 1 is before us. A roll call has been requested. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. No.

The CLERK. Mr. Booker?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Boozman?

Senator BOOZMAN. No.

The CLERK. Mrs. Boxer?

Senator BOXER. Aye.

The CLERK. Mrs. Capito?

Senator INHOFE. No by proxy.

The CLERK. Mr. Cardin?

Senator CARDIN. Aye.

The CLERK. Mr. Carper?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Crapo?

Senator CRAPO. No.

The CLERK. Mrs. Fischer?

Senator FISCHER. No.

The CLERK. Mrs. Gillibrand?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Markey?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Merkley?

Senator MERKLEY. Aye.

The CLERK. Mr. Rounds?

Senator ROUNDS. No.

The CLERK. Mr. Sanders?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. No by proxy.

The CLERK. Mr. Sullivan?

Senator INHOFE. No by proxy.

The CLERK. Mr. Vitter?

Senator INHOFE. No by proxy.

The CLERK. Mr. Whitehouse?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Wicker?

Senator WICKER. No.

The CLERK. Mr. Chairman?

Senator INHOFE. No.

The CLERK. Mr. Chairman, the yeas are 9 and the nays are 11.

Senator INHOFE. The amendment is not agreed to.

Are there other amendments?

Senator BOXER. Yes.

Senator INHOFE. Senator Boxer?

Senator BOXER. Thank you so much.

I know everyone has things to do. I had nine amendments but I am only offering three. I know they are painful for you, but we will make it quick. I have Boxer Amendment No. 5.

Senator INHOFE. Boxer Amendment No. 5, thank you.

Senator BOXER. This amendment simply says the bill is null and void if EPA or the Corps determines that implementation of the bill will increase costs. That should be a good one for you guys and gals. It would lengthen the time to obtain a permit or perpetuate the lack of regulatory predictability and certainty.

Stakeholders have waited far too long for EPA and the Corps to address the confusion created by recent Supreme Court cases. Now that the agencies have acted, we should not start the process over as this bill requires.

S. 1140 sends EPA and the Corps back to square one while adding new and confusing terms that will have to be interpreted and likely will be litigated. They will go straight to the courthouse door. I can assure you of that. Environmentalists have a record of winning, even in the U.S. Supreme Court as we did on climate and many other things.

S. 1140 could result in years of delay, confusion and uncertainty. My amendment ensures that the new requirements of this bill will not add to the problem by decreasing predictability and making it more difficult and time consuming to get a permit.

If you support certainty and predictability, and if you do not want to see more cost associated with this, I hope you will support Boxer Amendment No. 5.

[The text of Boxer Amendment No. 5 follows:]

AMENDMENT NO. _____ Calendar No. _____

Purpose: To establish conditions under which the Act ceases to be effective.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

1 At the end, add the following:

2 **SEC. 8. LIMITATION ON APPLICABILITY.**

3 The provisions of this Act shall cease to be effective
4 if the Administrator or the Secretary determines that the
5 implementation of the provisions is likely—

6 (1) to increase the cost to comply with the re-
7 quirements of section 402 or 404 of the Federal
8 Water Pollution Control Act (33 U.S.C. 1342;
9 1344);

2

1 (2) to increase the length of time required to
2 comply with the requirements of section 402 or 404
3 of that Act; or

4 (3) to perpetuate the lack of regulatory predict-
5 ability and consistency, in effect as of the date of en-
6 actment of this Act, in implementing the require-
7 ments of the Federal Water Pollution Control Act
8 (33 U.S.C. 1251 et seq).

Senator INHOFE. Thank you, Senator Boxer.

I would observe the amendment gives the EPA and the Corps the discretion to decide whether or not any of these three standards are met. I believe that would render S. 1140 ineffective, in my opinion.

Do others want to be heard? Senator Cardin?

Senator CARDIN. Mr. Chairman, I will be brief.

I now have the drift of your concerns. I appreciate that. You do not want to give the discretion to the Environmental Protection Agency or the Army Corps to implement the Clean Water Act.

Therefore, I think it is incumbent upon us to write the regulation and put it into law and for us to take on the responsibility that would normally go with an agency. I do not think we can do that, but I do not know how this committee can act by the Majority in saying we are not going to give the agency the ability to carry out our intent through its actions because we do not believe they will do that.

The Majority is saying that to us in a way that is consistent with what we intend and yet we are not prepared to enact a definitive statute as to how the law operates. You are sending it back. To me, what you are doing is just delaying and delaying and delaying. We have delayed it over a decade.

You are not doing any favors to the stakeholders who have to operate under the Clean Water Act. They need certainty. One thing I have learned, when I talk to different business groups, residents and people, they want certainty. They say, give us the rules and we will operate under the rules.

Yet, Mr. Chairman, you are saying you do not want to give the ability of the agency to bring certainty and you are not prepared to give the certainty by statute. That puts us in a terrible position.

I am just expressing my frustration and support of the Boxer Amendment.

Senator INHOFE. Let me respond by expressing my frustration.

It might be that you feel that the Administrator, the Corps and the others are in a position to make these determinations unilaterally without the input of someone who is elected. If you talk to any of the farmers or ranchers in Oklahoma and you will find they look to us, not the unelected bureaucrats, for the interpretations. I would object to it.

Does anyone else want to be heard?

Senator BOXER. I would just close.

Senator INHOFE. Yes, of course. Senator Boxer.

Senator BOXER. I hear over and over again from Republican friends that they do not want to have rules or laws that increase costs. All we are saying is if there is an increase in costs and if it is going to take more time to obtain a permit or perpetuate the lack of regulatory predictability, the bill is null and void.

If you want to vote no against predictability and costs, high costs, go ahead. I am sure you will, but just know that it is kind of unusual to see my Republican friends voting against something that clearly says, if it is going to increase costs, it should be null and void.

Let us vote and see. Maybe I will be shocked.

Senator INHOFE. Senator Boxer, thank you very much.

Senator ROUNDS. Mr. Chairman?

Senator INHOFE. Yes, Senator Rounds?

Senator ROUNDS. I think the Ranking Member has perhaps hit on what is one of the key issues that many of us feel has to be addressed. That is, in this particular case, this amendment would actually ask the rulemakers to decide whether or not they could void a law passed by Congress and allow them to recreate the rules the way they want to interpret them without any oversight from Congress.

In other words, this would suggest the agency itself could look at our legislation as passed and then, if it increases costs, in their determination, they could then eliminate the direction of the Congress of the United States.

That is wrong. That is exactly getting to the heart of the problem of what is going on with the bureaucracy in Washington today. They are creating 3,500 more rules every single year. We have a million rules on the books today. None of them have been approved by the elected Members of Congress. They are put into effect and there is no oversight today.

Perhaps the way we fix it is in the future, this Congress takes back the responsibility to actually make sure the rules being put in place follow the guidelines and understanding and interpretation of the Congress which passed the rule of the law in the first place.

I really do believe that is what this is all about.

Senator CARDIN. Would my colleague yield?

Senator ROUNDS. I would.

Senator CARDIN. I appreciate your comments because I think many of us share the responsibility we have in Congress to oversee agencies. I take that very, very seriously.

The challenge is that we do not have the same capacity to do the scientific peer reviews that the agency does to use best science, to do all that is implied in the Clean Water Act. That was always the intent of Congress, that it be based upon science, that there be scientific peer-reviewed data used and cost analyses must be done. All that must be done. It is done by the agency. We should be oversighting that. I agree with you, but how do we proceed if they cannot get a regulation done?

Senator ROUNDS. Mr. Chairman, if I could, the Science Advisory Board was designed to actually address the issues as presented to them not only by the agency but also by this committee. If you take a look at the GAO report, which was just done and completed and passed out, it suggests very strongly that they are not being asked for those analyses in terms of what the costs are today.

Not only should the agency take into account what the Science Advisory Board could do if requested, but then it should be shared with us as to whether they came up with the analysis of what the actual costs are. I do not believe that is occurring right now.

I understand the need for good rules. I still think the elected officials in this Country should have the ability to look back, review and do the oversight on a regular and ongoing basis of what those rules should look like when they are implemented so that the laws put in place today, when they are implemented correctly, follow the spirit and the intent of the law itself.

I do not believe the rules being put in place today necessarily do that or that we have the system in place right now that effectively oversees that implementation. Until such time as that occurs, the only way we have to stop a bad law or bad rule from going into effect is to literally pass an act by Congress.

That is what we are trying to do today, to replace and say, we have seen the rules that you are putting in place, we see what you are trying to do, and we disagree. If we disagree, then we will rewrite a part of the law or amend the law so that you cannot do what you are trying to do or what you misunderstand our intent was in the first place.

Senator BOXER. Mr. Chairman, may I be heard?

Senator INHOFE. Senator Boxer.

Senator BOXER. I really trust my friend and believe he is here for the right reason, to do the right thing. But I just want to say the way it works or the way it should work is when Congress passes a law and it is overwhelmingly passed by Republicans, that was 1972, the Clean Water Act, then it is overwhelmingly reauthorized in 1987, and the agencies carried out, in this case it is the Army Corps and the EPA carried out, we do our oversight but we should not be tearing apart the Clean Water Act.

I will tell you this. The check and balance lies with the courts. There is no doubt about it. We have seen business sue on one hand, we have seen environmental groups sue and the courts have looked at this.

This bill rips the heart out of the rule and frankly, out of the Clean Water Act. As Senator Cardin so beautifully stated in his opening amendment, which we said let us at least restore that. We could not even get that vote here.

I want to say this. I hope you will vote for this. The fact is EPA approval among the American people is about 70 percent. Our approval is 19 percent. As much as my friend would like to see Congress trump the EPA, the American people know in their heart of hearts.

They do not want this to be about politics or are we voting for the polluters or are we voting for special interests. They want the EPA and the Army Corps. Even when you look at the polling done around this, the Corps overwhelmingly, on this particular rule, they trust the Corps 72 percent and trust us 25 percent on this rule, and EPA well over 60 percent.

My view is for all the talk about how wonderful we are, we all have egos and know we are here for the right reasons and I do not question that. We work hard and want to do the right thing. The American people say, get out of the way here, have the EPA and the Corps protect our waters.

That does not mean everything they do is right but this rips the heart out of the Clean Water Act. We should not be doing that. If I could say, this is a low point for me personally in this committee.

I have seen us argue about a lot of things but I do not see why we are doing this and I think it is sad. I would go so far as to say I do not think this will ever become law. I do not know anymore. I do not think it will, just judging from the votes we are having here.

In any event, I do not doubt my friend's intentions in any way but I do think we are ripping the heart out of a bill that is a landmark bill which has separated this Country from a lot of other countries and has done a great job for 40 years. We are messing with it and that is a sad day for the Environment Committee.

Senator INHOFE. Thank you, Senator Boxer.

Let me take the Chair's prerogative. It has been stated twice in the record in this meeting how overwhelmingly popular the Corps of Engineers and the Administrator and this Administration is.

Let me remind you that 60 percent of the responses during the comment period of this regulation were negative. I have never seen it that high. That is very negative.

The second thing is, you are right when you say we pass laws and we have oversight. We have different Administrations that come along and not always the same Administrator of the EPA, not always the same Corps of Engineers. In fact, they reflect the philosophy of the Administration.

If you think we are all that unpopular and they are that popular, I would invite you to come to Oklahoma. I would suggest that Senator Fischer, who had a field hearing in Nebraska, would probably agree with what I just said.

Senator BARRASSO. Mr. Chairman?

Senator INHOFE. Senator Barrasso.

Senator BARRASSO. If I may add to the points you raised, Senator Boxer appropriately talks about a law passed in 1972 and reauthorized in 1987. This is 2015. She talks about those who support the EPA. Let me tell you what was in the Washington Post on Monday, June 8.

I would imagine most Americans who read this story would not support this agency where the headline is Discipline at EPA Lax, Watchdog Says. "The Environmental Protection Agency is creating a festering culture of complacency by dragging its feet on actions against employee misconduct, the agency's watchdog found, employees watching pornography on government computers." This is under Gina McCarthy and there is a picture of Gina McCarthy there.

"Employees watching pornography on government computers and a senior executive who looked the other way while an employee faked a timesheet and a senior employee who took another paying job while on the Federal clock" are some of the examples the Inspector General cited last week.

In the realm of fraud and abuse, the Inspector General cited a need for better management oversight and prompt action against employees guilty of misconduct. The EPA, they say, is not using the tools it has to take action against employees who break the rules.

Investigators cited examples of wrongdoing that were no-brainers for quick punishment, this is under Gina McCarthy, but were handled instead by a laissez-faire approach. Two employees, each earning \$120,000 a year, watching pornography on the job, were put on paid administrative leave for almost a year before anyone tried to fire them.

One case was discovered in November 2013, when Gina McCarthy was Director of the EPA and another was in May 2014. It took

until March 2015 for the agency to move to fire them. One employee retired. The other remains on paid leave while appealing the decision. I do not believe the American people aware of this would be supportive of an agency under the direction of Gina McCarthy.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso.

Senator BOXER. Mr. Chairman, since this is about my amendment and it has gotten a little bit off track, I do not know what someone watching pornography, which is outrageous, has to do with that. A person should be fired, fined and maybe jailed, I do not know the details, but what does that have to do with making sure that when people turn on the tap water and they have a drink, they do not get sick from some chemical toxin in the water?

We could talk about lots of other things in the news that you would not want me to bring up. Let us not go there.

I urge an aye vote. I want to have a roll call on this.

Senator INHOFE. Boxer Amendment No. 5 is before us. There has been a motion. Is there a second?

Senator CARDIN. Second.

Senator INHOFE. A roll call has been requested. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. No.

The CLERK. Mr. Booker?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Boozman?

Senator BOOZMAN. No.

The CLERK. Mrs. Boxer?

Senator BOXER. Aye.

The CLERK. Mrs. Capito?

Senator INHOFE. No by proxy.

The CLERK. Mr. Cardin?

Senator CARDIN. Aye.

The CLERK. Mr. Carper?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Crapo?

Senator CRAPO. No.

The CLERK. Mrs. Fischer?

Senator FISCHER. No.

The CLERK. Mrs. Gillibrand?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Markey?

Senator MARKEY. Aye.

The CLERK. Mr. Merkley?

Senator MERKLEY. Aye.

The CLERK. Mr. Rounds?

Senator ROUNDS. No.

The CLERK. Mr. Sanders?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. No by proxy.

The CLERK. Mr. Sullivan?

Senator INHOFE. No by proxy.

The CLERK. Mr. Vitter?

Senator INHOFE. No by proxy.
 The CLERK. Mr. Whitehouse?
 Senator WHITEHOUSE. Aye.
 The CLERK. Mr. Wicker?
 Senator WICKER. No.
 The CLERK. Mr. Chairman?
 Senator INHOFE. No.
 The CLERK. The yeas are 9 and the nays are 11.
 Senator INHOFE. The motion is not carried.
 Are there other amendments?
 Senator Markey.
 Senator MARKEY. Thank you, Mr. Chairman.
 I have an amendment at the desk, Markey Amendment No. 1.
 Senator INHOFE. Markey Amendment No. 1. Senator Markey.

**OPENING STATEMENT OF HON. EDWARD J. MARKEY,
 U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator MARKEY. Thank you, Mr. Chairman.

This amendment intends to focus on public health, only the public health aspect of what this bill could undermine. It wants to say that there should not be a negative result with regard to the drinking water that could ultimately wind up poisoning people who drink it.

The new EPA Clean Water Rule is about clarity, clarity for developers, for farmers or city and town managers and landowners. The rule was written to clarify ambiguities resulting from two Supreme Court decisions on whether some types of wetlands are considered to be waters of the United States that are subject to the Clean Water Act.

Since these types of wetlands supply most of the water that flows through our rivers, this legal ambiguity means EPA might be powerless to protect drinking water sources from pollution dumped into wetlands.

A staggering number of groups actually asked EPA to write this rule to clarify the legal ambiguities. These groups included steelworkers, manufacturers, road builders, retailers, farmers, religious organizations, public health groups, real estate developers, miners and oil and natural gas developers. In 2013, these groups were joined by 30 Republican Senators who sent a letter asking the EPA to write the rule.

The EPA rule resolves uncertainty and controversy. It improves consistent administration of the Act and it clarifies the roles of State and Federal Government. More than 800,000 comments were sent in support of the Clean Water Rule. More than 80 percent of the public and small business owners favor the protections it provides.

Where the Clean Water Rule seeks clarity, the bill we are considering today would only muddy the waters by introducing new ambiguities, ignoring science and creating new pollution loopholes in the Clean Water Act. This bill's only solution to pollution is confusion. Where EPA's Clean Water Rule will reduce litigation, this bill would spawn lawsuits by inventing undefinable, unscientific terms which would be impossible to administer consistently.

This bill would strip the protections from wetlands that supply drinking water to 117 million Americans. The bill puts drinking water at risk for 7 million people in my own State of Massachusetts alone. It is this very issue that I am most concerned about, the drinking water supply that millions of Americans rely on to be clean and safe.

My amendment is very simple. It merely states that the provisions of this bill cannot go into effect if the EPA Administrator determines that their implementation is likely to increase the probability of exposure to toxic pollutants in amounts that could adversely impact the health of people, including infants, pregnant women and the elderly who need a source of safe drinking water.

It is as simple as that. It deals with infants, pregnant women and the elderly and the health effects that could, in fact, be created because of this bill which is being propounded. If you want to keep the "clean" in the Clean Water Act, then you should vote for my amendment.

If you do not think the bill before us today is a threat to drinking water, then you should also vote for my amendment. I urge an aye vote.

[The text of Markey Amendment No. 1 follows:]

AMENDMENT NO. _____ Calendar No. _____

Purpose: To establish conditions under which the Act ceases to be effective.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. MARKEY

Viz:

1 At the end, add the following:

2 **SEC. 8. LIMITATION ON APPLICABILITY.**

3 The provisions of this Act shall cease to be effective
4 if the Administrator determines that the implementation
5 of the provisions is likely to increase the probability of ex-
6 posure to discharges of toxic pollutants in amounts that
7 could adversely impact the health or welfare of persons
8 who are served by public drinking water systems, including
9 infants, children, pregnant women, the elderly, and other
10 vulnerable populations.

Senator INHOFE. Thank you, Senator Markey.

I would respond that as I have looked at this, it looks like the EPA could vacate the bill by making a spurious determination. I think after the comments made by Senator Barrasso, I am not sure I want to have those individuals making those spurious determinations, so I would oppose the amendment.

Do others want to be heard? If not, Markey Amendment No. 1 is before us. Is there a motion?

Senator MARKEY. I would ask for a roll call.

Senator INHOFE. There is a motion and second and a roll call has been requested. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. No.

The CLERK. Mr. Booker?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Boozman?

Senator INHOFE. No by proxy.

The CLERK. Mrs. Boxer?

Senator BOXER. Aye.

The CLERK. Mrs. Capito?

Senator INHOFE. No by proxy.

The CLERK. Mr. Cardin?

Senator CARDIN. Aye.

The CLERK. Mr. Carper?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Crapo?

Senator CRAPO. No.

The CLERK. Mrs. Fischer?

Senator FISCHER. No.

The CLERK. Mrs. Gillibrand?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Markey?

Senator MARKEY. Aye.

The CLERK. Mr. Merkley?

Senator MERKLEY. Aye.

The CLERK. Mr. Rounds?

Senator ROUNDS. No.

The CLERK. Mr. Sanders?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. No by proxy.

The CLERK. Mr. Sullivan?

Senator SULLIVAN. No.

The CLERK. Mr. Vitter?

Senator INHOFE. No by proxy.

The CLERK. Mr. Whitehouse?

Senator WHITEHOUSE. Aye.

The CLERK. Mr. Wicker?

Senator WICKER. No.

The CLERK. Mr. Chairman?

Senator INHOFE. No.

The CLERK. The yeas are 9 and the nays are 11.

Senator INHOFE. The motion is defeated.

Are there other amendments? Senator Boxer?

Senator BOXER. I have my last amendment.

I just want to say that it is very sad to paint the employees of the EPA with the brush of one individual or even a small group who were doing terrible things, just like it would be bad to paint all of us because some leader in the Congress also has a bad past.

Let us not do that. It is wrong. It is just plain wrong. I feel for those people who come to work every day whether it is the Army Corps or the EPA and come there for the right reasons, to do the right thing, to protect drinking water, to protect the vulnerable populations.

Let us not paint Gina McCarthy with this brush or anybody else. It is a disgrace to do it. It is awful to do it. It is wrong to do it.

I call up my Amendment No. 6. The amendment says the bill is null and void if EPA or the Corps, who I would remind everyone have multiple times more approval among the people than we do, if they determine that implementation of the bill would increase pollution or increase costs incurred by the States.

Remember unfunded mandates? This bill could very well lead to unfunded mandates. This bill could. Also, it could lead, and will lead, if it does ever become law, I believe to increased pollution because there are going to be so many streams, rivers and bodies of water that are exempted that will then dump pollution into drinking water and dump pollution into recreational streams and rivers.

Over 40 environmental law professors who write and teach about the Clean Water Act have said S. 1140 would constitute a massive weakening of the Clean Water Act. Let us be clear what this is. You can hide behind attacks on the EPA, attacks on the Army Corps all you want but what you are doing is a backdoor repeal of the Clean Water Act with huge carveouts. This is what they write, that it could be argued to exclude vast swaths of currently protected water.

The bill will dramatically narrow the scope of the Clean Water Act, allowing uncontrolled pollution and placing an extraordinary burden on our States because EPA will be absent, the Corps will be absent.

Trust me, I have been in local government. When someone gets sick, they knock on your door and that is your problem and you will not be able to call on the EPA or the Army Corps to help because they will be excluded from this.

This amendment, my amendment, my last one, ensures that the bill will not undermine the basic goals of protections of the Clean Water Act which prevent pollution. The amendment makes sure that the bill will not place all of the burden for protecting our waterways on the States and require them to shoulder the costs.

I would hope we would have at least one or two people from the other side, who constantly lecture us about how we do not want to put more costs and burdens on the States, would vote for this.

If you oppose increasing pollution in our Nation's waterways and if you oppose putting greater burdens on the States, I urge a yes vote on this amendment. I would move it.

[The text of Boxer Amendment No. 6 follows:]

WEI15600

S.L.C.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To establish limitations on the applicability of the Act.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1140

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

1 At the end, add the following:

2 **SEC. 8. LIMITATION ON APPLICABILITY.**

3 None of the provisions in this Act shall apply if the
4 Administrator determines that the implementation of the
5 provisions is likely—

6 (1) to increase the interstate movement of pol-
7 lutants through surface waters;

8 (2) to increase the costs to be incurred by a
9 State to maintain or achieve approved water quality
10 standards for the State; or

- 1 (3) to cause or contribute to the impairment of
- 2 surface or coastal waters of a State.

Senator INHOFE. Thank you, Senator Boxer.

I would only respond the same as I did to the last one, that the EPA could vacate the bill by making a spurious decision and I would oppose this amendment.

Do others want to be heard? Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Once again, I think we have come down to the heart of what many of us see as one of the major problems with the way the Federal regulatory process works today. Not only would this amendment suggest that the EPA could overturn a congressionally determined law by their own determination but in this particular case, it even goes farther in that it suggests that we would be addressing surface waters of the individual States.

Once again, we may think that being elected as Members of Congress we should make all of the determinations for every level of government. I think it is about time that we decide that if we wanted to be school board members or if we want to dictate what happens in our local schools, we ought to be on the school board.

At the same time, if we want to make determinations about surface waters in the States, that would be back at the legislative level in the States. Not all good advice from us is necessarily good law that should be dumped back on the local levels.

With all due respect to the Ranking Member, I really think there are responsible individuals at the State level just like there are responsible individuals at the Federal level. With Congress suggesting that we could allow a Federal bureaucracy or an administrator to make a determination as to our intent and then to overturn a law passed by this Congress goes to the very heart of what is wrong with Washington, DC. today.

I really think this is the heart of the problem that we have when we talk about the Environmental Protection Agency and their impact at the local level where it appears as though we think we at the Federal level know everything there is to know about what is going on at the State level and that we should assert the responsibilities which rightly belong to the States where there are good people who care just as much about quality water as we do.

Senator INHOFE. Senator Cardin?

Senator CARDIN. First of all, I think Senator Rounds raises many very important points but I think there is some fundamental misunderstanding as to what our appropriate role should be, what a Federal agency's appropriate role should be, and how we should interact with the States.

I have heard complaints that there have been too many regulations issued and the number of regulations. Congress passes laws. They are well intended. We want clean water. We want clean air. That was not controversial among the Democrats and Republicans because the public understands that clean water and clean air is not controlled by one State, that you need to have a Federal policy on how you are going to get clean water.

The water that is going to end up in the tap when I turn it on in Baltimore may very well have come through West Virginia. They understand that we have to deal with the water of the Nation. That is why we passed the Clean Water Act.

We are not scientists, we are not capable of developing all of the implementing regulations, so we asked the agency to do that. We give them certain direction on how that is going to be done. We are pretty clear about that and the type of reviews they have to go through, including scientific reviews, costs analyses, and complying with what Congress sets up as the goals. We have already gone through some of that.

Senator Boxer's amendment is pretty clear in what it says. It says "cause or contribute to the impairment of surface or coastal waters of the States." They have to make that determination.

We have seen court decisions when the agencies go beyond what Congress says they can do. We have court oversight and we should have congressional oversight. I agree with Senator Rounds.

I think one of the most important responsibilities of this committee and every committee of Congress is to oversight the laws on the books rather than always looking to create new laws. I think that is very important. If we have to change or eliminate laws, we need to do that. I agree with you on that. That is our responsibility.

However, do not say we are not going to let agencies carry out their responsibilities because they are not complying with the will of Congress. If we do not think we are clear about what we say, let us say it clearer. We cannot be the implementing agency.

Part of what I find frustrating is the fact there happens to be a Democrat sitting in the White House. I had to say that because I think that is part of the problem we are confronting today, that we do not believe an agency will carry out what I, as an individual member believe they should, even though the law says something different than what I believe as an individual member of the Senate.

I am not questioning anyone's motives. Believe me, I am not. The collective wisdom of the Congress of the United States said we want clean water. It is up to the Environmental Protection Agency and the Army Corps to carry out those directives.

Yes, we can be clearer in those directions and we should be clearer. We can have the agency here for oversight hearings to make sure they are carrying out what we believe the intent should be.

Members of the committee, we have been debating this issue for over a decade under both Democratic and Republican Administrations. If this bill becomes law, we are back to the drawing board and we have the same ambiguity, the same case by case determinations which our stakeholders do not want because we have not been able to figure out how Congress needs to interact with the agency on a review. Do not blame the agency, it is our responsibility.

The Boxer Amendment is a directive to what they must do. They cannot just say we are going to overturn the rules of Congress. They have to comply with the language we put in the statute or anyone can take them to court, as they have taken them to court. They have taken them to the Supreme Court of the United States with, by the way, decisions that had additional ambiguity that only Congress can clarify.

Yet we are not trying to clarify it and now we are blocking the Administration from trying to give some clarity to the stakeholders

and protect what Congress said is the mandate of clean water for the United States.

I understand Senator Rounds' frustration. We are all frustrated by this. I hope together this committee can carry out its most fundamental responsibility of oversight. That is what we need to do.

You are going to have my support and I think all of us want to make sure that the agency is carrying out what Congress said, not what I would like Congress to have said, but what Congress has said and carry it out in the most cost effective way. On that, we would be together.

In the meantime, I am afraid if this bill became law without some of the amendments we have offered, what we are doing is basically failing to carry out our responsibility in Congress.

Senator BOXER. Mr. Chairman?

Senator INHOFE. Senator Boxer.

Senator BOXER. Thank you.

I urge an aye vote but I really want to say how important I think this debate has been. It has been done with respect for each other.

I hope anyone who has watched this understands how breathtakingly different it is now than it used to be when it comes to environmental protection. I will prove it by putting a letter in the record in a minute.

We have always felt, all through history until this moment, that when it comes to our drinking water, Republicans and Democrats have agreed that no matter where you live, your child should have safe drinking water and your elderly grandmother should have it. Everybody should have it. It is an American value.

Now, all of a sudden, wait a minute, I hear voices here which are sincere. We do not know everything. Of course, we do not know everything but I know one thing. I think a child in Arkansas, Alaska, California, Maryland or any one of our States deserves to be protected.

I would unanimous consent to place in the record this incredible letter. I do not know how my staff found it but they did. It is from the very first and the fifth Administrator of the EPA under both Nixon and Reagan. Ronald Reagan, I would say is the hero of the Republicans. I always hear him being praised up and down.

Listen to this. This is Ruckelshaus who wrote this in 2007. "Broad Clean Water Act jurisdiction is not only necessary to clean up the Nation's waters, it is necessary to ensure that the responsibility for maintaining and restoring clean water is shared equitably throughout the watershed and from State to State.

"In passing the Clean Water Act, Congress recognized that the State-by-State approach to water pollution control had failed and that it was necessary to maintain a Federal floor for water pollution control to ensure that discharges in one State do not jeopardize water quality in another."

I would like to put that in the record.

Senator INHOFE. Without objection.

[The referenced information follows:]

FROM :

PHONE NO. :

Jul. 19 2007 11:15AM P2



M A D R O N A I N V E S T M E N T G R O U P, L L C.

July 17, 2007

The Honorable James L. Oberstar
 House Committee on Transportation and Infrastructure
 Rayburn House Office Building 2165
 Washington, DC 20515

Dear Chairman Oberstar:

As the first (and later the fifth) Administrator of the U.S. Environmental Protection Agency, I represented the Administration in the debates over the Federal Water Pollution Control Act amendments of 1972. The Nixon Administration supported a comprehensive federal effort, undertaken in cooperation with the states, to get the nation's severe water pollution problems under social control, and that initial effort has largely been successful. EPA supported a broad definition of "navigable waters" as "waters of the U.S." Like Congress, we recognized that the "chemical, physical, and biological integrity of the Nation's waters" could not be maintained and restored unless pollutants could be controlled at the source, before they enter traditionally navigable waters.

As the head of the EPA at that time, I and my staff were responsible for the implementation and enforcement of the sweeping new law. To faithfully interpret the key jurisdictional term "navigable waters" that Congress had just broadly redefined as "waters of the United States," EPA proposed a regulatory definition of the term "waters of the United States" that included interstate and intrastate waters. In the three decades since the Clean Water Act's passage, EPA has consistently interpreted the term "navigable waters" to cover all "waters of the United States," including non-navigable tributaries and wetlands.

Broad Clean Water Act jurisdiction is not only necessary to clean up the Nation's waters. It is necessary to ensure that the responsibility for maintaining and restoring clean water is shared equitably throughout the watershed and from state to state. In passing the Clean Water Act, Congress recognized that the state-by-state approach to water pollution control had failed, and that it was necessary to maintain a federal "floor" for water pollution control to ensure that discharges in one state do not jeopardize water quality in another.

 1000 SECOND AVENUE, SUITE 1700 • SEATTLE, WA 98104

TEL: 206.674.3000 • FAX: 206.674.3000

PRINCIPALS: TOM A. ALBREG • PAUL GOODRICK • GERALD GRINSTEIN • WILLIAM D. RHOUGHTON JR.

FROM :

PHONE NO. :

Jul. 19 2007 11:15AM P3

It is my understanding you are working on legislation that would create a statutory definition of "waters of the United States" based on the EPA's longstanding regulatory definition. To the extent this legislation, HR 2421, restores -- and does not expand -- the jurisdictional scope that existed for over three decades through many administrations, those of both Republicans and Democrats, it will provide a real service for the nation. By focusing strictly on restoring historic jurisdiction, H.R. 2421 can remove the crippling uncertainty, confusion, and delay currently being experienced by the State and federal agencies charged with implementing the Clean Water Act, as well as by the regulated community.

I appreciate your efforts to provide this clarity, and to assure protection of our nation's waters.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bill", with a stylized flourish at the end.

William D. Ruckelshaus

Senator BOXER. I will conclude with this point.

All this talk about the States know better. I love my Governor and I love my State and they are great. We work together on things. They want a strong highway bill. There my Chairman agrees, we work hand and glove.

We have a Federal Highway Trust Fund and there are some in the Republican Party who want to do devolution and have no role for the Federal Government. I hope we do not have it on this committee. We will find out when we bring forward our bill.

Look at Texas. They are always talking about Texas is alone, we do not need anyone else. The minute they had the floods, President Obama, please declare an emergency. We have to work together. There have to be values.

We have one Department of Defense. There are reasons. Dwight Eisenhower, another great man, said that you cannot have defense if you do not have a system of highways. Here we have the first EPA Administrator who was there again later, a proud Republican, saying State-by-State approach to water quality has failed.

It is a breathtaking change in the parties. I am shocked about it. I never cease to be shocked about it but it is the evolution of the parties. I am sad about it because I think the people will suffer and people will be hurt if this legislation were to pass because as I said, so many waterways would be exempted that we would have more people getting sick.

I do not think this will pass. I hope the American people will engage.

By the way, on the comments, there are different ways to look at the comments. Some ways to look at the comments is the way my friend portrayed it. Others are that more than 80 percent of the comments were positive on the rule.

Be that as it may, this is our turn to be heard. I think we all have been heard. I hope we will have an aye vote for this so we can take a stand against more State costs and a stand to protect the people from pollution.

Senator INHOFE. Senator Sullivan, I am going to ask a favor of you because I am getting a little concerned that we are getting down to the 11 quorum that we have to have to pass this. After we pass the bill and before we do the technical, which has to be done also, at that point, I would like to recognize you because I know of something you want to say that is pertinent to this and get some results from the counsel. Is that acceptable with you?

Senator SULLIVAN. Yes, Mr. Chairman.

Senator INHOFE. It would be right after the vote. We will still be in session.

Senator SULLIVAN. Thank you.

Senator BOXER. I move the amendment.

Senator INHOFE. Before you move the amendment, do others want to be heard?

Senator SULLIVAN. I would like to respond. We can vote now.

Senator INHOFE. You will get a chance to do that.

First of all, on Boxer Amendment No. 6, is there a motion?

Senator BOXER. Move the amendment.

Senator INHOFE. Is there a second?

Senator CARDIN. Second.

Senator BOXER. Request a roll call.

Senator INHOFE. A roll call has been requested. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. No.

The CLERK. Mr. Booker?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Boozman?

Senator BOOZMAN. No.

The CLERK. Mrs. Boxer?

Senator BOXER. Aye.

The CLERK. Mrs. Capito?

Senator INHOFE. No by proxy.

The CLERK. Mr. Cardin?

Senator CARDIN. Aye.

The CLERK. Mr. Carper?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Crapo?

Senator INHOFE. No by proxy.

The CLERK. Mrs. Fischer?

Senator FISCHER. No.

The CLERK. Mrs. Gillibrand?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Markey?

Senator MARKEY. Aye.

The CLERK. Mr. Merkley?

Senator MERKLEY. Aye.

The CLERK. Mr. Rounds?

Senator ROUNDS. No.

The CLERK. Mr. Sanders?

Senator BOXER. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. No by proxy.

The CLERK. Mr. Sullivan?

Senator SULLIVAN. No.

The CLERK. Mr. Vitter?

Senator INHOFE. No by proxy.

The CLERK. Mr. Whitehouse?

Senator WHITEHOUSE. Aye.

The CLERK. Mr. Wicker?

Senator WICKER. No.

The CLERK. Mr. Chairman?

Senator INHOFE. No.

The CLERK. The yeas are 9 and the nays are 11.

Senator INHOFE. Thank you. The amendment is not agreed to.

Seeing no further members wishing to seek recognition to offer amendments, I move to accept the Manager's Amendment to S. 1140 and report the legislation to the Senate. Is there a second?

Senator WICKER. Second.

Senator INHOFE. We will request a roll call. The Clerk will call the roll.

The CLERK. Mr. Barrasso?

Senator BARRASSO. Aye.

The CLERK. Mr. Booker?

Senator BOXER. No by proxy.
 The CLERK. Mr. Boozman?
 Senator BOOZMAN. Yes.
 The CLERK. Mrs. Boxer?
 Senator BOXER. No.
 The CLERK. Mrs. Capito?
 Senator INHOFE. Aye by proxy.
 The CLERK. Mr. Cardin?
 Senator CARDIN. No.
 The CLERK. Mr. Carper?
 Senator BOXER. No by proxy.
 The CLERK. Mr. Crapo?
 Senator INHOFE. Aye by proxy.
 The CLERK. Mrs. Fischer?
 Senator FISCHER. Aye.
 The CLERK. Mrs. Gillibrand?
 Senator BOXER. No by proxy.
 The CLERK. Mr. Markey?
 Senator MARKEY. No.
 The CLERK. Mr. Merkley?
 Senator MERKLEY. No.
 The CLERK. Mr. Rounds?
 Senator ROUNDS. Aye.
 The CLERK. Mr. Sanders?
 Senator BOXER. No by proxy.
 The CLERK. Mr. Sessions?
 Senator INHOFE. Aye by proxy.
 The CLERK. Mr. Sullivan?
 Senator SULLIVAN. Aye.
 The CLERK. Mr. Vitter?
 Senator INHOFE. Aye by proxy.
 The CLERK. Mr. Whitehouse?
 Senator BOXER. No by proxy.
 The CLERK. Mr. Wicker?
 Senator WICKER. Aye.
 The CLERK. Mr. Chairman?
 Senator INHOFE. Aye.
 The CLERK. Mr. Chairman, the yeas are 11 and the nays are 9.
 Senator INHOFE. The ayes have it and the legislation is favorably reported to the Senate. Before we do our motion on the technical corrections, I would like to recognize Senator Sullivan.
 Senator SULLIVAN. Thank you, Mr. Chairman.
 I have a quick question for counsel. Under Section 4(b)(3) of the introduced bill, it states that the terms "waters of the United States" under the Clean Water Act should not include "water that is located below the surface of the land including soil and ground-water."
 Does this reference to soil and water include water in permafrost and water in the saturated soils that lie above permafrost?
 Staff. Yes, Senator, it does.
 Senator SULLIVAN. Thank you. Thank you for that clarification.
 Mr. Chairman, if it is OK, I just wanted to respond very briefly. I think this has been a very good debate as Senator Boxer men-

tioned. I think there are a number of us, Senator Cardin mentioned there is some frustration, and I would agree with that.

We all certainly want clean water. My city in Anchorage gets awards almost every year for having some of the cleanest, if not the cleanest water, in the United States. It is in large measure due to the local and State authorities who make it that way.

We also want to protect the Constitution and the separation of powers and Federal overreach. One of the frustrations we have had that has been the motivation behind this bill, again I agree with Senator Boxer, there are many great employees at the EPA but they have been acting in a way that exceeds their authority. This is not just hypothetical.

There was a lawsuit last year, Utility Air Regulator Group v. EPA, where the Supreme Court said something in very similar situation, the EPA issued a regulation under the Clean Air Act. Many opposed that. I was Attorney General of the State of Alaska and opposed that. They said the EPA did not have the authority to do that, it was expanding its jurisdiction.

The Supreme Court said the only body that can expand the EPA's jurisdiction is this body. That is what they are trying to do with their "waters of the U.S." reg, expand their jurisdiction. No one, I believe on either side of the aisle, thinks the EPA has the authority to expand its own jurisdiction. That is the crux of the issue.

Let me give you one sense on the frustration of oversight. The EPA Administrator has sat before this committee a number of times. I have asked her a simple question, can you provide the legal basis, the legal opinion under the Clean Water Act that gives you the justification for this rule? It is simple. That is oversight. She has never responded, never responded.

When you get blown off like that in terms of oversight, I think it is exactly the prerogative of the Congress to clarify what the law is and say where and when they do not have the authority. That is why I think this is a very important bill.

They need to respond to oversight. When they do not do it, we need to act. In this case, they will not even provide the Congress, this committee, an opinion that says here is our authority under the Clean Water Act to issue this regulation, to issue this rule. They have never responded. That is outrageous. She needs to respond to this committee.

It is a simple request. It is oversight. It is us doing our job. They need to do their job by responding.

Thank you, Mr. Chairman.

Senator BOXER. Mr. Chairman?

Senator INHOFE. Senator Boxer.

Senator BOXER. I agree that we have a right to have our questions answered. I will work with you on that, absolutely. There is no doubt in my mind.

I would urge you to take a look at all the court cases in totality that the EPA has won and lost. I would argue if you look at the Supreme Court, they have mostly won. I would argue when environmental groups push the EPA, because they are not doing enough, the environmental groups win.

I think it is worthwhile to take a look at these cases. I would say again, the honesty here in this committee today, I commend. I really do. We heard today the true heart and soul of members on both sides. It is an unbelievable change. The people have to understand it.

I will continue as long as I am sitting here and it will be next to my Chairman until I go on to do other work, a lot of it will probably be a continuation of the work I have done, but I will continue to point out where I think we can come together and not be so separated on this issue of protecting our people.

None of us wants a child to get sick. But the bottom line, let us recognize what you say in the name of deregulation and our authority over their authority, at the end of the day, what are we doing? Are we making our people safer or are we not?

To me that is the reason I am here, to make sure people are protected. This is totally different, whether it is taking the fight to ISIS, which I want to do, not with our combat boots on the ground I might add, but taking the fight to them and also making sure that when our kids drink the water, they are safe or when they swim.

I read recently, where was it, in Ohio where that child got sick in the last couple of years, got sick swimming because the waters had gotten so warm there were all kinds of toxins there that were not usually there. I think it was Lake Havasu. Am I right? Yes.

What we do here regardless if it is at a peak that no one answered our letter, and I agree that is wrong, or at a peak because we are more important than the EPA and more important than the Corps and all that, OK.

To me the most important thing is that our people are protected. Today, we took a giant step backward on that front, a giant step. I do not care what the bill is called. We have a tendency here of giving these bills beautiful names. What is this one called, the Federal Water Quality Protection Act? It is not about that.

Let us look past the title. We have beautiful titles for bills but they are really not beautiful bills.

Senator CARDIN. Mr. Chairman?

Senator INHOFE. Just a minute, Senator Cardin.

Let me respond to that first and then we have one member who has not been here who may want to be heard. Do you want to be heard? She does not.

Let me repeat. We have said many, many times, the Republicans want clean water, we want our kids to drink clean water and we are going to be doing all we can.

The Republican Party and the parties have not really changed. You talked about Ruckelshaus. It happened during that time there were EPA Administrators and others who were not abusing people on the outside. That is not true today. It is our job in oversight to be responsible to their needs.

Without objection, I am going to enter into the record the Monday, June 8 Washington Times referred to by Senator Barrasso.

[The referenced information was not received at time of print.]

Senator INHOFE. Do others want to be heard?

Senator BOXER. Mr. Chairman, may I correct myself? I made a mistake. I have to correct the name of the lake. Is that OK?

Senator INHOFE. Sure.

Senator BOXER. Lake Havasu is in Arizona. On Trip Advisor, it says "Visitors to Lake Havasu beaches not told of killer parasite in the lake." I was wrong on the State. There was an incident in Ohio.

My point is all of what we do really does have implications for people.

Senator CARDIN. Mr. Chairman, very quickly, I want to respond to Senator Sullivan's point because I agree with Senator Boxer. There should be no disagreement on our committee that any reasonable request be honored by any member of our committee and certainly by our committee for information. I certainly support that.

I wanted to point out on the constitutional issues that there are three branches of government, not two, not just the Executive and the Congress. We also have the Judicial Branch.

In regard to these rules, we were operating, I think, with a clear understanding prior to the Swank and Rapanos decisions of the Supreme Court. It was the Rapanos decisions that told Congress the agency had to clarify the waters of the U.S. That threw in the uncertainty which is the Supreme Court interprets the laws.

Either Congress or the agencies had to respond to the Rapanos decision and that is what we have been wrestling with ever since that Supreme Court decision came down. I thought I would just point that out. There are not just two branches of government. There are three branches of government involved in us trying to clarify the waters of the U.S.

Senator INHOFE. Thank you for that clarification.

I ask unanimous consent that staff have the authority to make technical and conforming changes to the measure approved today. Without objection, so ordered.

We are adjourned.

[Whereupon, at 11:04 a.m., the committee was adjourned.]

